(18,976.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 325.

SPENCER S. BULLIS, PLAINTIFF IN ERROR,

vs.

JAMES R. O'BEIRNE, ON BEHALF OF HIMSELF AND ALL OTHER BONDHOLDERS OF THE ALLEGHENY AND KINZUA RAILROAD COMPANY, AND THE CENTRAL TRUST COMPANY OF NEW YORK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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1

Supreme Court,

CITY AND COUNTY OF NEW YORK.

2

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of THE ALLEGHENY AND KINZUA RAILROAD COMPANY,

Plaintiff,

Against

SPENCER S. BULLIS, MILLS W. BARSE, THE ALLEGHENY AND KINZUA RAILROAD COMPANY and CENTRAL TRUST COMPANY OF NEW YORK,

Defendants.

Summons.

Trial desired in the City and County of New York.

3

To the above-named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

4

Dated July 14, 1891.

FRANK SULLIVAN SMITH,

Plaintiff's Attorney,

Post-office Address and Office, No. 54 Wall Street, New York, N. Y.

5 SUPREME COURT, STATE OF NEW YORK.
CITY AND COUNTY OF NEW YORK.

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of THE ALLEGHENY AND KINZUA RAILROAD COMPANY,
Plaintiff.

Against

SPENCER S. BULLIS, MILLS W. BARSE, THE ALLEGHENY AND KINZUA RAILROAD COMPANY and CENTRAL TRUST COMPANY OF NEW YORK,
Defendants.

6

For a complaint herein the plaintiff respectfully shows:

I. That the plaintiff is the owner and holder of ten
7 of the first mortgage bonds of The Allegheny and Kinzua Railroad Company, which was formed by the merger and consolidation of the Bradford and Corydon Railroad Company and the Allegheny and Kinzua Railroad Company, of the State of Pennsylvania, and the Allegheny and Kinzua Railroad Company of the State of New York, and is engaged in the maintenance and operation of a line of railroad in the County of Cattaraugus and State of New York, and in the
9 County of McKean in said State of Pennsylvania, and is a corporation duly created and existing under and by virtue of the laws of the States of New York and Pennsylvania; that said railroad company has a capital stock of $500,000, consisting of 5,000 shares each of the par value of $100.

II. That the merger and consolidation of said constituent companies, and the extension of the railroad of said defendant railroad company, was part of a single plan or scheme for the construction and consolidation of the lines hereinafter mentioned, devised by and between said defendants Spencer S. Bullis and Mills W. Barse, and the firm of I. B. Newcombe & Co., bankers of the City of New York, to effectuate which said plan the following agreements were made and entered into:

1st. On the eighth day of October, 1889, an agreement in writing, dated on that day, was duly made and entered into between said defendants, Bullis and Barse, and said firm of I. B. Newcombe & Co., providing, among other things, for the consolidation under the laws of the State of Pennsylvania, and extension of the railroads of said Allegheny and Kinzua Railroad Company of the State of Pennsylvania and said Bradford and Corydon Railroad Company, the aggregate constructed mileage of which was at that time sixteen miles, and by the terms of said agreement was to be extended to thirty miles under said consolidation; and further providing for the issue and sale of certain bonds to be issued by said consolidated railway company by said firm of I. B. Newcombe & Co., to be secured by a mortgage or deed of trust, including, as well as all the other property of said consolidated railroad company, thirty thousand acres of timber land covenanted and agreed by said defendants, Bullis and Barse, to be conveyed to said trustee and placed under such mortgage, in the manner stated in said agreement; a copy of said agreement is hereto annexed as a part of Exhibit A,

to which the plaintiff prays leave to refer as part of this complaint.

2. On the ninth day of December, 1889, a certain other agreement in writing, dated on that day, was duly made and entered into between said defendants, Bullis and Barse, and said firm of I. B. Newcombe & Co., modifying the terms of the said first mentioned agreement, and providing, among other things, for the merger and consolidation of said Allegheny and Kinzua Railroad Company of Pennsylvania, and said Bradford and Corydon Railroad Company, and said Allegheny and Kinzua Railroad Company of New York, having an aggregate mileage of twenty-four miles of constructed road, and also providing for the extension of said roads to an aggregate mileage of seventy miles, as stated in said agreement; for the issue of the stock of said Consolidated Railroad Company, and its bonds secured by mortgage of all its other property, as well as certain forty-six thousand acres of timber land, covenanted and agreed by said defendants, Bullis and Barse, to be conveyed to said trustees and made subject to the lien of said mortgage, as follows, to wit: thirty thousand acres thereof for the first forty-six miles of railroad constructed and completed, and sixteen thousand acres for the additional twenty-four miles of railroad to be constructed and completed as therein stated; and the sale by said firm of I. B. Newcombe & Co. of certain of said bonds under the terms and conditions of said agreement.

And the plaintiff further shows that said defendants, Bullis and Barse, then and there falsely and fraudulently pretended and represented to the said

firm of I. B. Newcombe & Co., that said thirty thou- 17
sand acres of timber land was free and clear from all encumbrances; that the same was contiguous and adjacent to the line of said railroad, as the same was then constructed, surveyed and projected, and that said land was covered by a large quantity of merchantable timber which would be sufficient to, and would actually, provide said railroad company with at least seventy tons of freight for conveyance over said railroad at rates of from twenty-five cents to fifty 18
cents per ton, in addition to the percentage accruing to said defendant railroad company from divisions with other lines.

And the plaintiff further shows, that it was also agreed, among other things, in and by said agreement, between the parties thereto, that the said defendants, Bullis and Barse, parties of the second part, 19
might cause a contract to be entered into with The Interior Construction and Improvement Company, a corporation of the State of New Jersey, by and for the benefit of said railroad company, for the purpose of constructing and completing the line of railroad therein mentioned, in the manner therein prescribed.

The plaintiff annexes hereto a copy of said agreement between said I. B. Newcombe & Co. and said 20
defendants Bullis and Barse, dated December 9, 1889, as a part of Exhibit A, and prays leave to refer to the same for a detailed account of its contents, as though set out at large herein.

3d. Acting under the provisions of said agreement last above mentioned and in conformity therewith, and as part of said scheme, said Bullis and

21 Barse, parties to said above mentioned agreements, on said ninth day of December, 1889, caused an agreement in writing, dated on that day, to be duly made and entered into between The Interior Construction and Improvement Company, a corporation duly created and existing under and by virtue of the laws of the State of New Jersey, and said Allegheny and Kinzua Railroad Company of New York, wherein, and whereby said construction company agreed,
22 among other things, to cause said merger and consolidation to be effected, and to construct and complete certain extensions of the railroad of such consolidated railroad company, for the bonds and stock of said railroad company, to be exchanged thereafter for the bonds and stock of such consolidated railroad company, which said last mentioned bonds were to be limited to an aggregate issue of $500,000, and to
23 be secured by the mortgage or deed of trust of said consolidated railroad company upon all its line and property, including said forty-six thousand acres of timber land to be conveyed by said defendants, Bullis and Barse, as above set forth, and subject to the provisions of the several agreements relating to the same hereinbefore referred to.

And the plaintiff further shows that the defendant
24 railroad company, by virtue of said merger and consolidation as well as at all times subsequent thereto, has duly ratified, assumed and agreed to fully carry out and perform each and every of the covenants, promises and agreements undertaken by its said predecessor company, in and by the terms of said agreement with said The Interior Construction Company.

A copy of said agreement between said construction company and said railroad company is hereto annexed as Exhibit B, to which plaintiff prays leave to refer for a detailed account of its contents, to the same effect as if set out at large herein. 25

4th. As a part of said scheme said parties to said agreement Exhibit A, namely, I. B. Newcombe & Co., and said defendants, Bullis and Barse, on said ninth day of December, caused an agreement in writing, dated on that day, to be duly made and entered into between said The Interior Construction and Improvement Company and said defendants, Bullis and Barse, wherein and whereby said construction company agreed to make certain disposition of the bonds and stock to be paid to it under the provision of said agreement, Exhibit B, and said defendants, Bullis and Barse, duly undertook and agreed to perform all the covenants undertaken by said construction company in and by the terms of said agreement, Exhibit B, including, among other things, the placing of the proper amount of timber land, to wit, forty-six thousand acres, under the lien of said mortgage or deed of trust to be executed by said merged and consolidated railroad company as provided in said agreement, and generally to save harmless said construction company by reason of any covenants therein undertaken to be performed by it; a copy of which said agreement is herewith annexed as Exhibit C, to which your orator prays leave to refer as a part of this bill. 26 27 28

III. And the plaintiff further shows that said agreements, Exhibit A, Exhibit B and Exhibit C, were made and executed for the mutual benefit and advantage of said defendants, Bullis and Barse, said

29 firm of I. B. Newcombe & Co., and said railroad company and its then and future bondholders and stockholders, and that said construction company was to receive no profit or advantage whatever from said contract, except for the use of its name and credit, 1,350 shares of the capital stock of said defendant railroad company; and said construction company was used in the transactions between said defendants
30 Bullis and Barse, said firm of I. B. Newcombe & Co. and said railroad company only to aid said parties in effectuating said original scheme of consolidation and extension in carrying out the provisions of said several agreements above mentioned, by which, among other things, that end was sought to be attained.

IV. And plaintiff further shows that in and by the terms of said several agreements hereinbefore
31 mentioned and hereto annexed, adequate provision is made for the construction and completion of branches and extensions of the railroad of said defendant railroad company; and that of said $500,000 of bonds of said railroad company, but $300,000 at par value were to be used for the extension and completion of the railroad of said railroad company up to the mileage of forty-six miles, and that the remaining $200,000 of said bonds were to be reserved for the
32 construction and completion of additional railroad, to wit, the twenty-four miles in said agreements mentioned.

V. And plaintiff further shows that in and by the terms of said before mentioned scheme, and the various agreements hereto annexed, executed in effectuation thereof, the said defendants, Bullis and Barse, duly undertook and agreed to place under the lien of

said mortgage or deed of trust to be executed by the 33
defendant railroad company 1,000 acres of timber land for each mile of railroad constructed and completed contiguous or tributary to said merged and consolidated railroad, its branches or extensions as follows, viz.: for the first forty-six miles of railroad so constructed and completed 30,000 acres, and for the additional twenty-four miles of railroad so constructed and completed, 16,000 acres in addition, all 34
of which 30,000 acres of land said defendants and each of them falsely and fraudulently pretended and represented to said firm of I. B. Newcombe & Co., was free and clear from all encumbrance, that all of said land was contiguous or adjacent to the line of said railroad as the same was then constructed or surveyed and projected, and the said land was covered by a large quantity of merchantable timber capable of yielding and producing seventy tons of freight in 35
timber, lumber and bark for each acre of land for transportation over said railroad.

VI. And your orator further shows that in accordance with and acting under said original plan or scheme and the several agreements in effectuation thereof, copies of which are hereto annexed, said defendant railroad company on the 1st day of February, 1890, executed its certain first mortgage or deed of 36
trust to the Central Trust Company of New York as trustee, bearing date on that day, and conveying to said trustee all of the line of railroad and other property, rights and franchises of said railroad company grantor, and providing for an issue of bonds thereunder limited to $500,000, to be secured by said property and franchises, and also 46,000 acres of timber

37 land to be conveyed or caused to be conveyed by said Bullis and Barse to said trustee in the manner above stated.

That the defendants, Bullis and Barse, caused said Bullis and Sarah E., his wife, to join with said railroad company in said mortgage as parties of the first part; and that said Bullis and wife, acting under said original scheme and the several agreements hereto an-
38 nexed by copy, and in part performance of the covenants and agreements made in that behalf by said defendants, Bullis and Barse, in and by said mortgage, assumed to convey to said trustee and place under the lien of said mortgage as a condition precedent to the issue of said $300,000 bonds above mentioned certain real estate therein described as timber land situate in the county of Cattaraugus, in the State of New York, and the county of McKean, in the State
39 of Pennsylvania, and falsely and fraudulently pretended and represented by said defendants, Bullis and Barse, to be free of prior incumbrance to be contiguous or adjacent to the line of said railroad and to be covered by a large quantity of merchantable timber as aforesaid, and aggregating 30,954.10 acres, more or less.

40 Plaintiff annexes a true copy of said mortgage or deed of trust hereto marked Exhibit D, and pray leave to refer to the same for a detailed account of its contents to the same effect as if set out at large herein.

VII. Plaintiff further shows that, under said original scheme and the various agreements and mortgage hereto annexed, it was a condition precedent to

the issue of said $300,000 bonds to be used for the 41
extension and completion of the first forty-six miles of railroad of said defendant railroad company that said defendants, Bullis and Barse, should cause 30,000 acres of timber land, situated as above stated and unencumbered by any prior lien, to be conveyed to said trustee and placed under the lien of said mortgage.

And plaintiff further shows that in accordance with the provisions of said several agreements, hereto annexed, and said mortgage or deed of trust, executed by said defendant railroad company to defendant the Central Trust Company of New York, as trustee, the said $200,000 in the bonds of the defendant railroad company can not be used for the construction of the railroad of said railroad company, except for additional railroad over and above said forty-six miles; and that the said $200,000 of said bonds cannot be 43
used for the construction of any railroad whatever, until the said additional timber land, provided for in said several agreements and said mortgage or deed of trust, shall be placed under the lien of said mortgage or deed of trust; and that the use thereof by said railroad company, said defendants Bullis and Barse or of said construction company would be in disregard of said several agreements, in violation of said original plan, and the trusts existing thereunder in 44
favor of plaintiff, as well as a fraud upon this plaintiff and other bondholders of said defendant railroad company.

VIII. And plaintiff further shows, that in accordance with the provisions of said several agreements hereto annexed, and in reliance upon the good faith of said defendants, Bullis and Barse, and the validity

45 of said apparent conveyance of 30,954.19 acres of timber land assumed to be made to the trustee in said mortgage above referred to by said defendant Bullis and wife, $300,000 of the bonds of said defendant railroad company were issued and duly sold by said firm of I. B. Newcombe & Co., and that the bonds which the plaintiff holds and owns are a part of said $300,000 of the bonds of said defendant railroad company, so issued and sold by said firm of I. B. New-
46 combe & Co., and were purchased by plaintiff with full knowledge, and relying upon the said several agreements hereinbefore mentioned, and particularly upon the provision therein contained for the conveyance to said trustee of 30,000 acres of timber land as a further security for said bonds.

IX. And plaintiff further shows that the proceeds
47 of all of said $300,000 have been expended in the construction of said extensions of said railroad, and in the payment of prior liens and incumbrances upon the property of said several constituent railroad companies, by the merger and consolidation of which the defendant railroad company was formed and that said defendant railroad company is utterly without funds for the completion of said extensions, and that the construction thereof, up to the said mileage of
48 seventy miles, is absolutely necessary, to enable said defendant railroad company to raise sufficient money to meet its liabilities under said mortgage as well as other liabilities.

And the plaintiff further shows, upon information and belief, that said The Interior Construction and Improvement Company, by its officers and agents, has demanded of said defendants, Bullis and Barse,

that they fulfill the terms and conditions of said several agreements hereto annexed, and place under the lien of said mortgage or deed of trust the said 16,000 acres of additional timber land, and provide for the construction of said additional railroad, but that the said defendants, Bullis and Barse, have refused to comply with the provisions of said several agreements, and to place said timber land under the lien of said mortgage or deed of trust; and plaintiff avers and alleges that said The Interior Construction and Improvement Company is helpless, and cannot proceed with the work of constructing and completing said additional railroad until said defendants, Bullis and Barse, shall have performed said conditions precedent. 49 50

X. And the plaintiff further shows that, notwithstanding all the facts above stated, and all the undertakings and agreements of said defendants, Bullis and Barse, in relation thereto, and the reliance of plaintiff and other purchasers of said bonds upon their good faith, it has been discovered since the issue and sale of said $300,000 of bonds that the said defendants Bullis and Barse never, in fact, caused to be conveyed to said Central Trust Company of New York, as trustee, or placed under the lien of the mortgage of said defendant railroad company 30,000 acres of unencumbered timber land, as agreed by them; and that said apparent conveyance of 30,954.19 acres of timber land by said Bullis and wife to said trustee, in and by the mortgage aforesaid, purporting to be a partial performance of said undertakings and agreements on the part of said defendant, Bullis and Barse, was and is in reality false and fraudulent in this, to wit: that 51 52

53 said 30,954.19 acres of timber land mentioned and described in said mortgage was not, at the date of said assumed conveyance of the same, unincumbered by any lien of whatsoever nature prior to said mortgage, but, on the contrary, said lands were at that time, and are now, as to some part thereof, owned by others than said defendant Bullis, and as to the greater part, encumbered by, and subject to, mortgages made by
54 said defendant Bullis as mortgagor, and prior in lien to the mortgage of said railroad company, to the extent of $159,000 of principal, besides interest thereon. That since the execution of said mortgage (Exhibit D), $14,223.02 of said prior incumbrances has been satisfied and discharged of record, leaving $144,776.07 thereof still remaining. And plaintiff further shows that said conveyance of timber land was, and is also false and fraudulent in this, to wit: that a large
55 portion of said land conveyed as aforesaid was not timber land, but was waste land from which all merchantable timber had been previously removed; and was, and is, not capable of producing, yielding or furnishing any freight whatever to said defendant railroad company for conveyance over said railroad, and that a large portion of said land so conveyed is not con-
56 tiguous or adjacent to the line of said railroad as aforesaid, and any freight obtained therefrom cannot be delivered for transportation over said railroad; and that a large portion of the land which said defendants assumed and pretended to convey, or caused to be conveyed, as aforesaid, was not owned by them or either of them, and has not in fact been conveyed to said trustee; all of which the said defendants, Bullis and Barse, well knew at the time they

made, or caused to be made, the said pretended conveyance of said 30,954.19 acres of land, as well as when they entered into said several agreements and made the said false and fraudulent representations. 57

Plaintiff shows that by the fraud and failure of said defendants, Bullis and Barse, to cause a proper amount of unencumbered timber land, to wit, 30,000 acres thereof to be conveyed to said trustee as security for said $300,000 of bonds already issued, and the failure of the title to a portion of said 30,954.19 acres of land mentioned in said mortgage of the defendant railroad company, a great fraud has been committed by said defendants, Bullis and Barse, upon the holders of such outstanding bonds, which will irreparably injure the said railroad company and its credit, and bring irreparable damage and injury to its bondholders and stockholders unless said defendants, Bullis and Barse, be decreed by this court to specifically perform their said undertakings and agreements in that behalf, and to make good the same by an immediate conveyance of the requisite amount, to wit, 30,000 acres of unencumbered timber land to said trustee in acocrdance with their said undertakings and agreements; that plaintiff is informed and believes that said defendant railroad company is powerless to perform its said agreement in that behalf. 58 59 60

XI. And plaintiff further shows, that said defendant railroad company has entered into contracts with various persons, firms, copartnerships and corporations owning and operating mills upon and near the line of the proposed extensions of said railroad, for the hauling of the products of the forest from said mills, wherein said railroad company agreed to com-

61 plete said extensions of said railroad within a certain time; that owing to the failure of said defendants, Bullis and Barse, to comply with the provisions of said several agreements hereto annexed, and to place in good faith said 30,000 acres of unencumbered timber land, and said additional timber land under the lien of said mortgage or deed of trust, and thus properly secure the said $300,000 of bonds now is-
62 sued, and also permit the said $200,000 in bonds of said railroad company to be used for the construction of said extensions, said railroad has been greatly damaged, and its earning capacity impaired, and said various persons, firms, copartnerships and corporations are claiming damages against said railroad company on account of its failure to complete said extensions of its railroad, whereby the bonds of the plaintiff in said railroad company have become de-
63 teriorated in value.

XI. And plaintiff further shows that said defendants, Bullis and said Barse, unlawfully, in violation of the terms and provisions of the annexed agreements, as well as in utter disregard of their trust as directors of said railroad company, during the entire period since said construction was undertaken and commenced by said defendants, Bullis and Barse, until
64 now, have made use of the credit of said railroad company to their own private and individual advantage, and prostituted their official positions as directors thereof to their own private uses and the injury and hurt of said corporations and its stockholders. That said defendants, Bullis and Barse, caused construction to be made upon certain branch lines as above stated, not authorized by said agreements

hereto annexed, which said lines were constructed upon the credit of the railroad company, and without proper authority by it, as well as upon their own credit or that of other corporations controlled by them, and extended to certain timber lands and mills wherein said defendant Bullis was interested, and by the construction of said lines the said defendants, Bullis and Barse, sought to employ all the advantages of their official position as directors of said railroad company, in the development of lumber interests in which they or said defendant Bullis were individually concerned and from which there was no adequate compensation to said railroad company for such unauthorized and unlawful construction. Plaintiff further avers and alleges that numerous steel rails and other articles and things used in construction, and belonging to said railroad company, were by said defendants, Bullis and Barse, fraudulently and secretly diverted from their proper use, and used by them in the construction of such unauthorized lines. That such diversion of assets and property continued as well after said defendants, Bullis and Barse, had failed to carry out to completion the construction agreed by them to be made, and made default in the contracts relating thereto as hereinafter stated, and the said construction company had entered upon the said work of construction, as during the period when said defendants, Bullis and Barse, were actually engaged in effecting the construction so agreed by them to be made.

65 66 67 68

XII. Plaintiff further shows that, notwithstanding the said agreements hereto annexed, and particularly the agreement, Exhibit B, between said construction company and said defendant railroad com-

69 pany, said defendant and said Barse and Bullis, acting in its name and as its officers, have, since the default and failure of said defendants, Bullis and Barse, to carry out the terms and provisions of said annexed agreement, Exhibit B, constructed, are now constructing, and threaten further to construct, in the name, upon the credit and at the expense of said defendant railroad company, certain lines of railroad
70 contemplated and provided for in and by said contract, as well as other lines above described, thereby injuring the credit of said railroad company, diverting its assets, and rendering it liable to suit by said construction company for breach of contract, to the damage and injury of said defendant railroad company and its stockholders and bondholders.

XIII. Plaintiff further shows that the further
71 construction of any of said lines of the said railroad company, in the absence of a proper conveyance of the timber land above mentioned, is both unlawful and unauthorized under the agreements hereto annexed, that it will render the said railroad company liable to damages, and that it has and will further impair its credit, which plaintiff avers and alleges is now very much impaired thereby.

72 Plaintiff further avers and alleges that, owing to said unlawful acts of said defendants, Bullis and Barse, the earning power of said railroad company has become very much impaired, and it has not, since said unlawful acts were commenced, in or about May, 1890, earned a sufficient sum over and above its fixed charges to pay the interest upon its outstanding bonded indebtedness, and if said railroad company and its said directors, the individual defendants above

named, are permitted to continue in the aforesaid 73
practices of loaning said railroad company's credit and constructing new lines in the unlawful manner stated herein, and defrauding the said company and its bondholders and stockholders, as above stated, said company will immediately incur heavy liabilities under said construction contract, Exhibit B, hereto annexed, and become insolvent long before the next annual meeting of the stockholders, which will not be 74
held until more than eight months hence.

XIV. Plaintiff further avers and alleges, upon information and belief, that said defendants, Bullis and Barse, have used and permitted the credit of said railroad company to be used in the favor and on the behalf of the Kinzua Valley Railroad Company, whereof said defendant Bullis is the president, and whose lines are located and about to be constructed, 75
with the permission and consent of the defendants, into territory now occupied in part by said defendant railroad company, for the purpose of competition therewith, to the great damage and injury of the interests of said defendant railroad company, and in direct violation of the agreements under which the said defendant railroad company was organized, and its mortgage made and the construction of its lines authorized, as well as in violation of the several 76
agreements referred to herein.

XV. Plaintiff further shows that said defendants, Bullis and Barse, and their creatures and associates as above stated, own a controlling interest in the stock of said defendant company, and are now and have been in possession and control of said defendant during its entire existence hitherto, and that not-

77 withstanding protests duly made to them and said railroad company, they and it have continued to do and commit the unlawful acts and things herein complained of.

XVI. Plaintiff further shows that, notwithstanding the said abandonment of construction agreed by said defendants, Bullis and Barse, as above stated to be made under said contract, Exhibit C, hereto an-
78 nexed, and after the gratuitous intervention of said construction company, above stated; furthermore, in spite of the fact that by said simulated conveyance to the said trustees, the defendant Central Trust Company of New York, of 30,954 19-100 acres of timber land, and the fraudulent failure of said defendants, Bullis and Barse, to properly convey to said trustee, free of encumbrance, the 30,000 acres agreed by
79 them to be conveyed to provide for the issue of and to secure said $300,000 of bonds; and notwithstanding the fact that neither said railroad company, nor any one in its behalf or otherwise, can legally continue said construction above mentioned, or any part thereof, or undertake or make any new construction of its said line of railroad, or any portion thereof, until said fraudulent and attempted conveyance of said 30,954 19-100 acres of encumbered timber land
80 shall have been replaced by 30,000 acres of timber land situated as above stated and entirely free of all encumbrance, as originally agreed, the said defendants, Bullis and Barse, have interfered, and are now interfering and threaten further to interfere with the said Construction Company in the construction made by it since the failure of said defendants, Bullis and Barse, to properly complete the same. That they

have also undertaken and are now continuing certain 81
unauthorized construction of lines of railroad, and are now preparing to carry on said construction on a large scale in the face of all liabilities and injury which may be thereby entailed upon the said railroad company, its bondholders and stockholders. Plaintiff avers and alleges in this connection that any such construction would be entirely unauthorized by and in violation of said original scheme, and the several 82
agreements, copies whereof are hereto annexed, and which were executed as aforesaid in effectuation thereof; and that by reason of such violation the credit of said railroad company will be impaired; that it will create hostility on the part of the bondholders by reason of the fraud perpetrated by said defendants, Bullis and Barse, upon them in the conveyance of said encumbered land, mentioned in said mortgage above described, and the further depletion 83
of their security by the creation of additional debt for construction; and plaintiff charges that all the acts above mentioned of said defendants, Bullis and Barse, were and are made entirely with the view of increasing the value of their own property and generally in their own pecuniary interest, utterly regardless of the effect thereof upon the said railroad company and its finances; and plaintiff shows, that unless 84
said fraudulent practices and actions heretofore carried on and committed be at once remedied by this court, by its decree directing the specific performance by said defendants, Bullis and Barse, and said defendant railroad company of their undertakings and agreements hereinabove set forth or referred to, and an injunction incidental thereto preventing the further commission of such or any other unlawful

85 practices and acts, irreparable injury will at once accrue to said railroad company and its bondholders and stockholders, and that the plaintiff and all others similarly situated will be entirely remediless in the premises.

And plaintiff further shows that the said mortgage or deed of trust, so executed by said defendant railroad company, a copy of which is hereby annexed as
86 Exhibit D, contains a provision to the effect that the defendant Central Trust Company of New York, the trustee therein named, shall release from the lien and operation of said mortgage or deed of trust any portion or portions of the timber land and real estate therein described, upon the payment to said trustee, to be applied to the purchase or redemption of the bonds thereby secured, of the value of such portion
87 of timber land and real estate so to be released; such value to be determined by a majority of the board of arbitrators, consisting of three persons, of whom the said trustee should, upon the request in writing of said defendant railroad company, or of said defendant Bullis, appoint one, and the said defendant Bullis should appoint a second, and the two arbitrators thus appointed should select a third, and a majority of the three arbitrators so appointed should have full power
88 to fix and determine the amount of money to be paid to said trustee upon the release of said portion or portions of said timber land and real estate from the lien and operation of said mortgage or deed of trust. That the said defendants, Bullis and Barse, have caused and procured said defendant railroad company to make application to said defendant trust company, and have themselves made application

thereto, under the said provision contained in said 89
mortgage or deed of trust, for the appointment of arbitrators for the purposes hereinbefore set forth. That under and in accordance with such application, J. C. French, of Olean, N. Y., S. A. Mundy and J. A. McClure, of Bradford, Pa., were unknown to plaintiff, or any other bondholder, appointed arbitrators under and for the purposes set forth in the tenth article of said mortgage or deed of trust, and that 90
said arbitrators have made, or pretended to make, their awards or certificates in writing, copies of which are hereto annexed as Exhibits E and F, to which the plaintiff prays to refer as a part of this complaint. That said arbitrators have thereby certified that the value of 3,112 5-11 acres, more or less, of the timber land and real estate described in and covered by said mortgage or deed of trust is one dollar per acre, and that the value of the whole of said tract of 3,112 5-11 91
acres is $3,112.45. That said arbitrators have thereby also certified that the value of 1,267¾ acres, more or less, of timber land and real estate described in and covered by said mortgage or deed of trust is one dollar per acre, and that the value of the whole of said tract is $1,267.75.

And the plaintiff further shows, that it is apparent from the awards or certificates of said arbitrators, on 92
the face thereof, that the said defendants, Bullis and Barse, have perpetrated a gross fraud upon said defendant railroad company and its bondholders and stockholders, including the plaintiff, in that the said lands covered thereby and described therein are in substantially the same condition and of the same value as when the said lands were placed under the

95 lien of said mortgage or deed of trust, and that they have not deteriorated in value since the said conveyance thereof by the said Bullis and wife to said defendant trust company. That if the said lands were timber lands at that time of said conveyance they were then and are now worth at least $25.00 per acre. That the said defendants, Bullis and Barse, have been guilty of a fraud upon the said defendant railroad
96 company, its bondholders and stockholders, either in causing said lands to be conveyed as aforesaid, or in procuring said award or certificate to be made by said arbitrators; and plaintiff is informed and believes that the said defendants, Bullis and Barse, are endeavoring to have the said lands released from the lien of said mortgage or deed of trust for the purpose of in some manner avoiding liability under their several contracts hereinbefore mentioned for the reason,
97 among others, that said lands are not contiguous or adjacent to the line of said railroad, or that the said defendants and neither of them had title thereto or said lands were encumbered, or that at the time of said conveyance the said lands were not timber lands.

And plaintiff further shows, that by the fair intent and meaning of said mortgage or deed of trust, Exhibit D, none of said timber lands and real estate
98 were to be relased from the lien and operation thereof until the full amount of thirty thousand acres of land should be placed under the lien of said mortgage or deed of trust. That said defendants, Bullis and Barse, and said railroad company, have never complied with the terms of said several contracts, in that they have never caused to be placed under the lien of said mortgage or deed of trust thirty thousand acres

of unencumbered land, and that the security of the 97
plaintiff and his co-bondholders will be deteriorated if the said defendant trust company shall be permitted to release any of said lands heretofore conveyed to it from the lien and operation of said mortgage or deed of trust, before the entire amount of thirty thousand acres of unencumbered timber land shall be placed under the lien thereof, in accordance with the true intent and meaning of said several contracts and 98
agreements and said mortgage or deed of trust.

And plaintiff further shows, that said defendant trust company is threatening, and is about to execute a release of said lands described in said awards or certificates of arbitration, Exhibits E and F, and this plaintiff is without adequate remedy at law in the premises to prevent the same.

And plaintiff further shows, that prior to the com- 99
mencement of this action he duly applied to the defendant, Central Trust Company of New York, and requested it, for the protection of said bondholders, to take adequate action in the premises, and to bring an action or actions in due form to prevent the commission by said defendants, Bullis and Barse, of the several continuing wrongs hereinbefore set forth, and to obtain a decree or decrees of a court or courts 100
of competent jurisdiction for the immediate specific performance on the part of said Bullis and Barse of their covenant to convey unto the said trustee, and place under the lien of said mortgage or deed of trust, thirty thousand acres of timber land, contiguous or tributary to the line of railroad of said railroad company, as in said agreements stated, free of all en-

101 cumbrance of whatever nature, prior to the said mortgage or deed of trust; and in addition thereto sixteen thousand acres of like timber land, in all respects similarly situated and free from encumbrance, as security, and to authorize the issue of the $200,000 of bonds, in said agreements specified and set apart for the construction of said twenty-four miles of railroad of said railway company, additional to the forty-
102 six miles of railroad hereinbefore mentioned; but that said defendant trust company has neglected and refused to comply with said request and take such action, or institute any suit or suits for the purpose of obtaining such decree or decrees; and that the plaintiff, as the owner and holder of the said bonds of said defendant railroad company, purporting to be secured by the said mortgage or deed of trust, has the same rights, privileges and powers, for the protection
103 of said plaintiff and his co-bondholders, that might have been exercised by said defendant trust company, the same being necessary for the protection of plaintiff and his co-bondholders, and the plaintiff therefore brings this action for himself, and on his own behalf, as well as on behalf of all other bondholders similarly situated, who may desire hereafter to come in and take advantage of the benefits sought
104 to be enforced by said action.

Wherefore, plaintiff demands judgment that immediate specific performance by the said defendants, Bullis and Barse, and said defendant railroad company of their said agreements to convey unto the trustee of said defendant railroad company's mortgage, and place under the lien of said instrument 30,000 acres of timber land contiguous or tributary

to the line of railroad of said railroad company, as in said agreements stated, free of all encumbrance of whatsoever nature prior to the said mortgage above mentioned; or that said defendants pay to said trustee, for the security of said bondholders, such a sum of money as the court shall ascertain to be equivalent to the value of said lands and real estate, conveyed as aforesaid, which are not in conformity with the terms of said several agreements, and said bonds, and the mortgage or deed of trust securing the same; and in addition thereto 16,000 acres of like timber land, in all respects similarly situated, and free from encumbrance, as security to authorize the issue of $200,000 of bonds in said agreements specified and set apart for the construction of the twenty-four miles of railroad of said railroad company additional to the forty-six miles above mentioned; and the said defendants, Spencer S. Bullis, Mills W. Barse and The Allegheny and Kinzua Railroad Company, and each of them, their attorneys, agents, servants and employees, be perpetually enjoined and restrained from doing, or causing or permitting to be done, any act or thing in violation of said agreements, copies whereof are hereto annexed; from contructing or permitting the construction of any lines, or extensions of any lines of railroad, either in the name of or upon the credit of said defendant railroad company, or that of the said individual defendants, and at the expense of said railroad company, until the said 46,000 acres of timber land above mentioned shall have been conveyed as prayed; and from constructing, or aiding, or encouraging the construction of said Kinzue Valley Railroad, or any competitive or other line of railroad, in violation of said original plan and their agreements

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and covenants relating thereto; from using or permitting the credit or names of said defendant railroad company to be used for the benefit of said defendants, Bullis and Barse, or either of them, and from wasting, or permitting the waste, of any of the assets or property of the said defendant railroad company, and from diverting, or permitting the diversion of the same from its lawful and proper purposes and objects under the charter and by-laws of said railroad company, or the agreements above mentioned.

And that a provisional or preliminary injunction be issued restraining and enjoining the said defendants, and each of them, their and each of their attorneys, agents, servants and employees, during the pendency of this cause in the manner above stated, and from doing the acts and things above mentioned in the prayer for final relief, and for such other and further relief as the circumstances of this case may require, and as is agreeable to equity and good conscience.

And that the defendant Central Trust Company of New York, its officers, agents, attorneys and employees, be enjoined and restrained from executing and delivering to said defendants, Bullis and Barse, or said defendant railroad company, or either or any of them, or to any person, firm, copartnership, or corporation, for them or either or any of them, any release or quittance of any portion of the lands and real estate mentioned and described in said mortgage or deed of trust until 30,000 acres of timber land contiguous or tributary to the line of railroad of said defendant railroad company be placed by said defendants Bullis, Barse and said railroad company, or one

of them, under the lien of said mortgage or deed of trust, free from all incumbrance except the lien of said mortgage or deed of trust. 113

And that the plaintiff have such other, further or different relief as to the Court may seem just, besides costs, to be paid by the defendants other than the defendant Central Trust Company of New York.

Dated July 15, 1891. 114

FRANK SULLIVAN SMITH,
Plaintiff's Attorney,
54 Wall Street, New York, N. Y.
WALTER ARTZ,
Of Counsel.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } ss.

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James R. O'Beirne, being duly sworn, deposes and says that he is the plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

JAMES R. O'BEIRNE. 116

Sworn to before me, this 15th
day of July, 1891.

LEWIS F. WILSON,
Notary Public (162),
City and County of New York.

117 EXHIBIT "A".

Memorandum of Agreement, made and entered into the 9th day of December, A. D. 1889, by and between Isaac B. Newcombe and Camille Weidenfeld, constituting the firm of I. B. Newcombe & Co., of the City of New York, parties of the first part, and Spencer S. Bullis, of the Village of Olean, in the State of New York, and Mills W. Barse, of the same place,
118 parties of the second part, witnesseth:

Whereas, The parties hereto entered into a certain agreement on the 8th day of October, A. D. 1889, a copy of which is hereto annexed and made a part hereof as Schedule "A"; and

Whereas, The parties are mutually desirous of making certain changes in the provisions of said agreement, and altering, modifying and adding to the
119 several things therein undertaken to be done and performed by the several parties; and

Whereas, The parties of the second part are the owners and holders of the capital stock of the Allegany and Kinzua Railroad Company, a corporation created and existing under the laws of the State of New York, with a capital of $80,000, extending from Red House, in the County of Cattaraugus, at a con-
120 nection with the railroad of The Western New York and Pennsylvania Railroad Company to the State line between the States of New York and Pennsylvania, a distance of about sixteen miles, of which about ten miles of railroad have been constructed and completed; and

Whereas, It is now proposed to cause said railroad to be constructed and completed to a connection with

the railroads mentioned in said Schedule "A", and to 121
cause the said Allegany and Kinzua Railroad, hereinbefore mentioned, and the said railroads mentioned in said Schedule "A" to be merged and consolidated into one line of railroad under the ownership and control of one corporation, to be formed by the merger and consolidation of the companies now controlling and owning said railroads, and to cause said new corporation to issue its fully paid capital stock 122
in the amount of $500,000 at par value, and to make, execute and deliver its first mortgage, thirty year five per cent. gold bonds, with interest payable semi-annually, to the amount of $500,000 at par value, to the Central Trust Company of New York, as trustee, or bearer, and to secure the same by a first mortgage or deed of trust upon the said merged and consolidated railroads, properties and franchises; and that said bonds and the mortgage or deed of trust secur- 123
ing the same shall contain adequate provisions for the creation of a sinking fund for the payment of the principal of said bonds, consisting of $15,000 per annum; and that such bonds and said mortgage or deed of trust shall be issued and executed in lieu of the bonds and the mortgage or deed of trust mentioned and described in the first article of said Schedule "A".

Now, therefore, in consideration of the premises, 124
the mutual covenants and agreements hereinafter contained, and other good and valuable considerations, the said parties have agreed, each with the other, as follows, that is to say:

First. The parties of the second part shall cause said merger and consolidation to be effected in due form under and in pursuance of the laws of the State

of New York and the Commonwealth of Pennsylvania, and shall duly cause said new corporation to issue its fully paid capital stock in the said amount of $500,000 at par value, and its first mortgage bonds in the aggregate amount of $500,000 at par value, of the character hereinbefore described, and shall cause the same to be secured by a first mortgage or deed of trust upon all the railroad, property and franchises of said merged and consolidated company, including thirty thousand acres of timber land for the first forty-six miles of railroad constructed and completed, and sixteen thousand acres for the additional twenty-four miles of railroad to be constructed and completed as aforesaid. Said bonds and said mortgage or deed of trust, including such additional security upon said timber lands, to be prepared and issued in a manner satisfactory to the parties of the first part.

Second. It is mutually understood and agreed by and between said parties that but $300,000 at par value of said bonds are to be put upon the market at once, and that said $300,000 at par value of said bonds shall represent forty-six miles of railroad constructed and completed, being the thirty miles of railroad mentioned in said Schedule "A", and the sixteen miles of railroad of the said Allegany and Kinzua Railroad Company, first hereinbefore mentioned. The remaining $200,000 at par value, with the same amount of capital stock, shall be reserved for the purpose of constructing and completing extensions of said merged and consolidated railroad under the direction of the engineer of the parties of the first part; and of said $300,000 at par value of said bonds, the

parties of the first part shall undertake to sell at par 129
$260,000 at par value, of which until the completion of additional main line of railroad, to be constructed and completed as designated in said Schedule "A" and in this agreement, the parties of the first part shall not be required to negotiate and sell as aforesaid a greater amount of said bonds than $125,000 at par value, for which they shall receive the commissions designated in Article Third of said Schedule 130
"A", and the parties of the second part agree that they will deliver to the parties of the first part, concurrently with the payment of said commissions, a contract in due form, whereby they will agree to sell and deliver the shares of said capital stock owned and held by them, which shall be a majority of the entire capital stock at the price of $66.66 per share at any time within two years from that date.

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It is further mutually agreed, that the parties of the first part shall not be required to negotiate and sell the remainder of said $300,000 at par value of said bonds, after deducting said $125,000 at par value, to be sold as aforesaid, and $40,000 at par value for commissions, being $135,000 at par value, except as the railroad to be constructed and completed as aforesaid shall be constructed and completed and put in operation in sections of five miles, 132
which sections shall be located and constructed in such manner as shall be designated by the said engineer; said road to be similar in construction and material to the portion of said railroad now built and in operation, and upon the completion of each of said sections, the parties of the second part shall be entitled to receive the proceeds of the sale of such

133 proportion of said $135,000 at par value of said bonds as said section of five miles shall bear to the total distance to be constructed and completed to make up said forty-six miles of constructed and completed railroad.

Third. It is mutually agreed that the parties of the first part shall not be expected or required to sell the said first installment of said $125,000 at par value
134 of said bonds, until the said mortgage or deed of trust shall constitute a security upon thirty thousand acres of land, and that said lands shall be of the character designated in the Sixth Article of said Schedule "A".

Fourth. It is further mutually agreed, that in case counsel shall so advise, the number of directors of said merged and consolidated company shall be thir-
135 teen, of which the said parties of the first part shall select six and the parties of the second part seven, and that the treasurer of said corporation shall be Camille Weidenfeld, one of the parties of the first part.

Fifth. The provisions of the Eighth Article of said Schedule "A" are hereby modified in so far that the matters and things required to be done and per-
136 formed on or before the first day of January, 1890, may be done and performed on or before the first day of February, 1890.

Sixth. It is mutually understood and agreed by and between the parties hereto that the parties of the second part may cause a contract to be entered into with The Interior Construction and Improvement Company, a corporation created and existing under and by virtue of the laws of the State of New Jersey,

for the purpose of causing the said several railroads to be merged and consolidated as aforesaid, and causing the said corporation formed by such merger and consolidation to issue said capital stock and bonds, and to cause said railroad to be constructed and completed in the manner hereinbefore, and in said Schedule "A" provided. 137

Seventh. The provisions of the Ninth, Tenth, Eleventh and Twelfth Articles of the said Schedule "A" are hereby made a part hereof as fully as if they were herein specifically set forth. 138

Eighth. All provisions of said agreement, Schedule "A", inconsistent with this agreement, are hereby declared void and of no effect, and all the provisions thereof not inconsistent with this agreement are hereby confirmed to all intents and purposes as if they had been incorporated herein as covenants duly undertaken by the respective parties, hereto, and to said agreement, Schedule "A". 139

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

I. B. NEWCOMBE & CO. [Seal.]
S. S. BULLIS. [Seal.]
M. W. BARSE. [Seal.] 140

SCHEDULE "A".

Memorandum of Agreement, made and entered into the eighth day of October, A. D. one thousand eight hundred and eighty-nine, by and between Isaac

141 B. Newcombe and Camille Weidenfeld, constituting the firm of I. B. Newcombe & Co., of the City of New York, parties of the first part, and Spencer S. Bullis and Mills W. Barse, of the Village of Olean, in the State of New York, parties of the second part, witnesseth:

Whereas, The parties of the first part are copartners engaged in the business of banking at No. 54 Wall
142 street in the City of New York; and

Whereas, The parties of the second part are the owners and holders of the capital stock of the Bradford and Corydon and the Allegany and Kinzua Railroad Companies, corporations existing under the laws of the Commonwealth of Pennsylvania, which said corporations are now engaged in the operation of an aggregate of sixteen miles of main line, and
143 whose lines of railway when completed will consist of thirty miles of main line of railway exclusive of branches and sidings; and

Whereas, The parties of the second part are also the owners of or control thirty thousand acres of land, situated in the County of McKean, in said State of Pennsylvania, on which are extensive and valuable tracts of timber; the products of which, viz., among
144 others, lumber and bark, the said parties of the second part are desirous of manufacturing and transporting, or causing to be transported, to proper markets by means of said several railroads when finished and completed, and to that end have sought the financial assistance of the parties of the first part, which the said parties of the first part are ready to give subject to the terms and conditions hereinafter stated.

Now, therefore, in consideration of the premises, 145
the mutual covenants and agreements hereinafter contained, and the sum of one dollar by each of said parties to the other in hand paid, the said parties have agreed each with the other as follows, that is to say:

First. The parties of the second part shall cause to be created in a manner consistent with the constitution and laws of the Commonwealth of Pennsyl- 146
vania a mortgage or deed of trust upon the railways, properties and franchises of said several railroad companies, and upon said thirty thousand acres of land, to be duly executed to the Central Trust Company of New York, as trustee, for the purpose of securing mortgage bonds in the aggregate amount of two hundred and fifty thousand dollars, payable thirty years from date, and to bear interest at the rate 147
of five per centum per annum, payable semi-annually in gold. The said mortgage or deed of trust and said several bonds to contain a provision for a sinking fund, to be created by the payment to said trustee of the sum of $12,500 per annum, for the purpose of paying off the principal and interest of said bonds; provided, however, that said mortgage or deed of trust, and said bonds secured thereby, shall be created and executed in a manner satisfactory to the 148
counsel of said parties of the first part, whose decision both as to the creation, matter and form of said mortgage or deed of trust, and said bonds shall be final and conclusive upon the parties hereto.

Second. The parties of the second part shall cause the said railways, properties and franchises of said several railroad companies, and the said 30,000

149 acres of land to be owned or controlled by a corporation created or to be created under the laws of the Commonwealth of Pennsylvania, and having a capital stock of $250,000 at par value.

Third. The parties of the first part shall undertake to sell at par $210,000 of said bonds; the proceeds of sales of said bonds to be paid over to the parties of the second part, their attorneys, heirs, administrators or assigns; provided, however, that until the completion of additional main line of railroad, to be constructed and completed as hereinafter designated, the parties of the first part shall not be required to negotiate and sell as aforesaid a greater amount of said bonds than $75,000 at par value; and provided further, that concurrently with the negotiation and sale by the parties of the first part of said $75,000 of said bonds at par value, the said parties of the first part shall be entitled to receive and shall receive, as commissions and for labor and services performed and to be performed, $40,000 of said bonds at par value, of which it is hereby mutually understood $15,000 at par value shall be paid to John Byrne, the engineer of said parties of the first part, for services performed and to be performed in the premises; that in addition to said amount in bonds the said parties of the first part shall receive a further commission of $100,000 at par value of said capital stock, of which $15,000 shall be paid to said John Byrne, and an option contract duly executed, whereby they shall possess the right to purchase the remainder of said capital stock, to wit: $150,000 at par value, at the price of $66,666 per share, at any time during the two years from that date; and provided further, that the parties of the first part shall not be

required to negotiate and sell the remaining $135,- 153
000 at par value of said bonds, except as the said several railways shall be completed and put in operation in sections of five miles, which sections shall be located and constructed in such manner as shall be designated by the said engineer, said road to be similar in construction and material used to the sixteen miles now built and in operation. And upon the completion of each of said sections the parties of the 154
second part shall be entitled to receive from the parties of the first part the proceeds of the sale of five-fourteenths at par of said 135 bonds.

Fourth. It is mutually agreed by and between the said parties that the said mortgage or deed of trust may contain a provision to the effect that said mortgage or deed of trust shall convey to said trustee, as a security for said bonds, one thousand acres of land 155
for each and every mile of main line of railroad completed and put in operation, so that when said parties of the first part shall sell the first installment of $75,- 000 of said bonds at par value the number of acres of land which shall then be covered by said mortgage or deed of trust need not exceed sixteen thousand acres; and that for every section of five miles of completed railroad, for which the said parties of the first part shall be required to negotiate and sell the re- 156
mainder of said bonds, exclusive of the said bonds received for commissions, it shall be sufficient for the purpose of this agreement and for the provisions of said mortgage or deed of trust that the parties of the second part cause to be conveyed to said trustee, and to be covered by said mortgage or deed of trust, five thousand acres of land in addition to the said sixteen thousand acres of land theretofore conveyed to said

trustee and covered by the lien of said mortgage or deed of trust.

Fifth. It is further mutually agreed by and between the parties hereto that in case the said parties of the first part shall exercise the said option, to be given to them in accordance with the provisions hereinbefore contained, and shall purchase the remainder of said capital stock thereunder; and in case the said parties of the first part, or the persons, firms, copartnerships or corporations then or at any time thereafter until the payment of said bonds and interest accruing thereon in full, shall consolidate and merge or seek to consolidate and merge the said capital stock, railways, properties and franchises of said railroad companies, or either of them, with the capital stock, property and franchises of any other railroad company, or lease the same unless the parties of the second part, their heirs, administrators or assigns, and the holders of three-fourths in amount of said bond, shall consent thereto, the lien of said mortgage or deed of trust shall thereupon cease and determine as to said timber lands; and the said mortgage or deed of trust shall contain a provision authorizing and directing the said trustee to release from the lien of said mortgage or deed of trust all of said lands, except the lands actually used by said railroad companies for right of way, stations, depot grounds, or other property or usual purpose in the operation of railways, anything to the contrary herein or in said mortgage or deed of trust contained notwithstanding.

Sixth. It is mutually agreed by and between the said parties that the said lands and real estate so to

be owned and operated by said corporation and cov- 161
ered by the lien of said mortgage or deed of trust shall be contiguous or tributary to one or the other of said several railroads, and they shall be timbered and profitable to said corporation.

Seventh. It is further mutually agreed by and between the said parties that the directors of said corporation, which sall own and control said lands and railways, properties and franchises, shall be seven in 162
number, out of which the said parties of the first part shall elect three; and that the treasurer of said corporation shall be Camille Weidenfeld, one of the parties of the first part.

Eighth. It is further mutually agreed that the said corporation shall be formed and placed in ownership and possession of said railroads and the said lands to the amount hereinbefore designated, and 163
shall execute said mortgage or deed of trust and have ready for delivery said bonds on or before the first day of January, 1890.

Ninth. The parties of the second part shall not permit a division of freight rates with connecting lines of railway less favorable to said railroads above mentioned, than division now in force under an agreement in writing between said Allegany and Kin- 164
zua Railroad Company and the New York, Lake Erie and Western Railroad Company, without the consent in writing of said parties of the first part, nor shall freight be transported over either of said railroads at a less arbitrary rate per ton than twenty-five cents in addition to through rates, except under contracts now in force, without the consent in writing of said parties of the first part.

Tenth. It being mutually understood and agreed, however, that if any differences or disagreements arise between the parties under this agreement, that the same shall be submitted to arbitration as follows:

Upon written notice by either party of its purpose to submit any such question to arbitration, each of said parties shall select a third, who shall be disinterested; and said arbitrators shall at such points as shall be determined, hear the parties and such evidence as shall be submitted, and shall within thirty days from the date of their appointment, unless both parties consent in writing to further time, determine such question and make their award thereon in writing, which shall be final and binding to both parties, and a majority of such arbitrators shall decide.

Eleventh. In consideration of the covenants hereinbefore undertaken by the parties of the first part, the parties of the second part hereby guarantee a dividend of six per cent. per annum, for the two years next following the date of this agreement, upon $40,000 at par value of the said capital stock, to be paid and delivered to the said parties of the first part as a part of their commissions as hereinbefore provided.

Twelfth. It is further mutually agreed by and between the said parties that this agreement shall bind the heirs, executors, administrators or assigns of the respective parties hereto.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

I. B. NEWCOMBE & CO. [Seal.]
SPENCER S. BULLIS. [Seal.]
MILLS W. BARSE. [Seal.]

EXHIBIT "B". 169

This Agreement, made and entered into this 9th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, by and between The Interior Construction and Improvement Company, a corporation created and existing under and by virtue of the laws of the State of New Jersey, hereinafter designated the "Construction Company," party of the first part, and the Allegany and Kinzua 170
Railroad Company, a corporation created and existing under and by virtue of the laws of the State of New York, hereinafter designated the "Railroad Company," party of the second part, witnesseth:

Whereas, The party of the first part is a corporation organized for the purpose, among other things, of building, repairing, completing and equipping railroads, and contracting with any person, copart- 171
nership, firm or corporation for such purposes, and receiving in payment therefor shares of stocks and bonds, or other securities and obligations; and

Whereas, The party of the second part is engaged in the construction, maintenance and operation of a railroad, extending from a connection with The Western New York and Pennsylvania Railroad at or near Red House station, in the County of Cattar- 172
augus, and State of New York, to a point in the State line between the States of New York and Pennsylvania, with a capital stock of $80,000.00, at par value; and

Whereas, The said railroad company proposes to cause its railroad to be constructed and completed to

the said State line between the States of New York and Pennsylvania, a distance of sixteen miles, and to acquire by merger and consolidation the railroads of the Bradford and Corydon Railroad Company and the Allegany and Kinzua Railroad Company, corporations created and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, whose lines of railroad when constructed and completed will connect with the railroad of the first party of the second part, and will aggregate about thirty miles of railroad situate in the State of Pennsylvania, and together with the railroad of said party of the second part will constitute a railroad consisting of forty-six miles of railroad; and

Whereas, Said railroad company proposes to cause said railroads, when merged and consolidated, to be extended through heavily timbered lands as far as the Kinzua Creek, in the County of McKean, and State of Pennsylvania aforesaid, for the purpose of obtaining an extensive traffic in the products of the forest;

Now, therefore, in consideration of the premises, the mutual covenants hereinafter contained, and other good and valuable considerations, the said parties have agreed and do hereby agree, each with the other, as follows, that is to say:

First. The said construction company shall construct and complete the railroad of said railroad company to the said State line between the States of New York and Pennsylvania, and shall acquire or cause to be acquired, in behalf of said railroad company, by consolidation and merger thereof with the companies

owning and controlling the same, the said Bradford 177
and Corydon Railroad and the said Allegany and Kinzua Railroad, situate in said State of Pennsylvania, and shall cause said merged and consolidated railroads to be constructed and completed without unreasonable delay, under the direction of and in accordance with the location to be designated and upon specifications to be furnished by the engineer of said railroad company, until the length of said merged and consolidated railroad shall be not less than forty- 178
six miles; and the said construction company shall thereafter, and when required and directed by said engineer, construct and complete extensions thereof upon routes to be designated and located by said engineer aggregating twenty-four miles of railroad, so that the entire system of railroad to be owned and controlled by said railroad company, or its successor company formed by such merger and consolidation, 179
shall consist of seventy miles of completed railroad, at not exceeding a cost of $7,000 per mile.

Second. The said railroad company for the purposes of this agreement and of the acquisition of said railroads and extensions, and for providing for its outstanding obligations, shall forthwith cause its capital stock to be increased to the amount of $390,000, in the manner required by law, and shall make, 180
execute, cause to be duly recorded and delivered to the Central Trust Company of New York, as trustee, its first mortgage, thirty year five per cent. gold bonds, with interest payable semi-annually on the first days of January and July in each year, in the aggregate amount of $500,000, and shall secure the same by a first mortgage or deed of trust upon all its railroad, property and franchises now possessed

181 and owned or hereafter to be acquired by it, which said capital stock, except sufficient shares to qualify its directors, and the entire amount of said bonds the said railroad company shall pay and deliver to the said construction company for the work performed and to be performed under this agreement. Said stock and bonds to be delivered to said construction company as soon as the same can be legally issued.

182 Third. The said railroad company shall do and perform all things necessary under the provisions of the statutes of the State of New York to merge its railroad, property and franchises with the several railroads, properties and franchises now owned and controlled by said Bradford and Corydon Railroad Company and said Allegany and Kinzua Railroad Company of Pennsylvania, and shall in good faith, by its
183 stockholders, directors, officers and agents, do all things reasonable and necessary to promote and consummate such merger and consolidation.

Fourth. The said construction company hereby agrees on its part to do and perform all things which it may or ought to do as the holder of the principal amount of the capital stock of said railroad company, to effect said merger and consolidation, and the ac-
184 quisition of said railroads situate in the said State of Pennsylvania.

Fifth. It is mutually agreed by and between the parties hereto that upon the merger and consolidation of said several railroads, as hereinbefore provided, the corporation owning and controlling the same shall issue its capital stock in the aggregate amount of $500,000, that being the sum of the capi-

tal stock of the said Pennsylvania corporations now existing, and the amount to which the capital stock of the party of the second part shall be increased as hereinbefore provided, and that the said new corporation shall issue its first mortgage bonds similar to the bonds to be issued by the said party of the second part, but contain a provision for a sinking fund to be created by the payment to said trustee of the sum of $15,000 per annum for the purpose of paying off the principal of said bonds, or for the retirement and cancellation of $15,000 at par value of said bonds per annum, and such additional provisions as counsel for the parties hereto may advise, for the purpose of taking up and retiring the bonds so to be issued by the party of the second part, and shall secure the same by a first mortgage or deed of trust upon all the railroad, property and franchises of said new corporation, including the railroad then constructed and completed as well as all railroad to be thereafter constructed and completed, and all property to be thereafter acquired by said new corporation. It is also mutually understood and agreed that said mortgage or deed of trust shall cover, in addition to the railroad, property and franchises of said new corporation, and as a further security to said bonds, one thousand acres of timber land for each mile of railroad constructed and completed, contiguous or tributary to the said merged and consolidated railroad, its branches or extensions, as follows, viz.: for the first forty-six miles of railroad so constructed and completed 30,000 acres, and for the additional twenty-four miles of railroad so constructed and completed 16,000 acres. Said construction company shall be entitled to receive, in exchange, for the

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189 shares of capital stock of said party of the second part held by it, an equal number of shares of capital stock of said new corporation, and to exchange the bonds of said party of the second part at par for the bonds to be issued by said new corporation as hereinbefore provided.

Sixth. The said construction company hereby agrees, from the proceeds of said bonds to be paid to
190 it as aforesaid, to pay off all liens and incumbrances existing upon the railroad, property and franchises of any of said railroads to be merged and consolidated as hereinbefore provided; and to cause to be placed upon said railroad at least six locomotives, four cabooses and sixty log cars, all in good condition.

Seventh. It being mutually understood and
191 agreed, however, that if any differences or disagreements arise between the parties under this agreement, that the same shall be submitted to arbitration as follows:

Upon written notice by either party of its purpose to submit any question to arbitration, each of said parties shall select a disinterested person as arbitrator, and the two thus selected shall select a third, who
192 shall also be disinterested; and said arbitrators shall at such points as shall be determined, hear the parties and such evidence as shall be submitted, and shall within thirty days from the date of their appointment, unless both parties consent in writing to further time determine such question and make their award thereon in writing, which shall be final and binding to both parties, and a majority of such arbitrators shall decide.

Eighth. It is further mutually agreed and by and between said parties, that this agreement shall bind the successor, successors or assigns of the respective parties hereto. 193

In witness whereof, the said parties have caused these presents to be duly executed by their respective presidents, and their respective corporate seals to be hereunto affixed, duly attested, the day and year first above written. 194

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

[Seal.] By JNO. BYRNE,
President.

Attest:

LEWIS F. WILSON,
Ass't Secretary. 195

ALLEGANY AND KINZUA RAILROAD COMPANY,

[Seal.] By S. S. BULLIS,
President.

Attest:

J. E. ROONEY,
Sec'y. 196

EXHIBIT "C".

This Agreement, made and entered into this 9th day of December, in the year of our Lord one thousand eight hundred and eighty-nine, by and between The Interior Construction and Improvement Com-

197 pany, a corporation created and existing under and by virtue of the laws of the State of New Jersey, hereinafter designated the "Construction Company," party of the first part, and Spencer S. Bullis, of the Village of Olean, in the State of New York, and Mills W. Barse, of the same place, parties of the second part, witnesseth:

Whereas, The party of the first part has this day
198 entered into an agreement with the Allegany and Kinzua Railroad Company, a corporation created and existing under and by virtue of the laws of the State of New York, a copy of which is hereto annexed, marked Schedule "A", and made a part of this agreement; and

Whereas, The parties of the second part are the owners of, and control the entire capital stock of said
199 Allegany and Kinzua Railroad Company;

Now, therefore, in consideration of the premises, the mutual covenants hereinafter contained, and other good and valuable considerations, the said parties have agreed and do hereby agree each with the other as follows, viz.:

First. The party of the first part hereby agrees to make the following disposition of the bonds and
200 stock of the new corporation to be formed by the merger and consolidation of said several railroad companies mentioned in said agreement, Schedule "A", and to be paid to it under the provisions of said agreement, that is to say:

The party of the first part shall deliver to I. B. Newcombe & Co., as soon as it shall receive the same, $260,000 at par value of said bonds, to be sold

by said I. B. Newcombe & Co., under the provisions of two several agreements entered into between said firm and the parties of the second part on the eighth day of October, 1889, and the ninth day of December, 1889, respectively, together with $40,000 at par value of said bonds and $100,000 at par value of said capital stock, as commissions due to said I. B. Newcombe & Co., under the provisions of their said several agreements with the parties of the second part. 201 202

The said construction company shall deliver to the parties of the second part, as soon as it shall receive the same, $165,000, at par value of the said capital stock of said new corporation.

The remainder of said bonds, being $200,000, at par value, shall be deposited by said construction company with the Central Trust Company of New York, as trustee, to be paid out upon the certificate of the engineer of said new corporation, for the construction and completion of the twenty-four miles of extensions specified in said agreement first hereinbefore mentioned, in such proportion as the length of each extension constructed and completed shall bear to the said total length of extension provided for in said agreement. 203

Of the remainder of said capital stock, being $235,000, at par value, the said construction company shall deliver to the parties of the second part $100,000, at par value, and retain $135,000 at par value of said capital stock for its compensation. 204

Second. The parties of the second part hereby agree to apply the proceeds of the bonds to be sold by said firm of I. B. Newcombe & Co., to the pay-

ment and cancellation of all liens and incumbrances upon any of the property to be covered by said mortgage or deed of trust; to provide for the construction and acquisition of the additional railroad to be acquired, constructed and completed under the provisions of said agreement; to do all things necessary to cause the capital stock of said Allegany and Kinzua Railroad Company to be increased and issued, and all exchanges of stock necessary under said merger and consolidation; to cause the bonds of said railroad company to be issued and secured by a proper mortgage or deed of trust; to cause said merger and consolidation to be duly effected, and the new corporation to be formed thereby to issue its new stock and bonds in the manner provided in said agreement; and to cause the proper amount of timber land to be placed under the lien of said mortgage or deed of trust to be exercised by said merged and consolidated corporation as provided in said agreement; and generally to save harmless the said construction company by reason of any covenant undertaken in and by the terms of said agreement, first hereinbefore mentioned, except the willful default or wrongful act of said construction company.

In witness whereof, the party of the first part has caused these presents to be duly executed by its president and its corporate seal to be hereunto affixed, duly attested, and the parties of the second

part have hereunto set their hands and seals the day and year first above written. 209

THE INTERIOR CONSTRUCTION AND IMPROVEMENT COMPANY.

[Seal.] By JNO. BYRNE,
President.

Attest:

LEWIS F. WILSON,
Ass't Secretary. 210

S. S. BULLIS. [L. S.]

M. W. BARSE. [L. S.]

EXHIBIT "D".

This Indenture, made this first day of February, in the year of our Lord one thousand eight hundred and ninety, between the Allegheny and Kinzua Railroad Company, hereinafter designated "said Railroad Company," and Spencer S. Bullis and Sarah E. Bullis, his wife, of Olean, in the County of Cattaraugus and State of New York, parties of the first part, and the Central Trust Company of New York, as trustee, party of the second part, witnesseth: 211

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Whereas, The said The Allegheny and Kinzua Railroad Company is a railroad corporation duly created and existing under and in pursuance of the laws of the States of New York and Pennsylvania by the merger and consolidation in due form of law of the Allegany and Kinzua Railroad Company, a corporation created under and by virtue of the laws of the State of New York, and engaged in the operation

213 and maintenance of a railroad from a point at or near Red House Station, in the County of Cattaraugus and State of New York, to a point at or near the State line between the States of New York and Pennsylvania, and the Bradford and Corydon Railroad Company, a corporation created under and by virtue of the Laws of the State of Pennsylvania, and engaged in the maintenance and operation of a railroad
214 from a connection with the said Allegheny and Kinzua Railroad at or near the said State line to a point on the west branch of the railroad of the New York, Lake Erie & Western Railroad Company, near the City of Bradford, in the County of McKean and State of Pennsylvania, and to a point in the Township of Corydon, in the County of McKean, and a point on Kinzua Creek, in the Township of Lafayette, in said County of McKean and State of Penn-
215 sylvania; and

Whereas, The said Central Trust Company of New York, party of the second part hereto, is a corporation duly created and existing under and in pursuance of the laws of the State of New York, with power to receive and execute the trusts of this indenture; and

216 Whereas, Said Allegany and Kinzua Railroad Company has heretofore issued to Frank Sullivan Smith, as trustee, its first mortgage five per cent. gold bonds in the aggregate amount of $500,000 at par value, bearing date the first day of February, A. D. 1890, and has secured the same by a mortgage or deed of trust to said trustee upon all its railroad, property and franchises; and

Whereas, At the time of such merger and consolidation there existed as a lien upon the railroad, property and franchises of said Bradford and Corydon Railroad Company a mortgage or deed of trust to the Manhattan Trust Company of the City of New York, as trustee, for $50,000, and also a mortgage or deed of trust to said Manhattan Trust Company of the City of New York, as trustee, for $60,000, making a total indebtedness secured by mortgage or deed of trust upon the corporate property, rights, privileges and franchises of said Bradford and Corydon Railroad Company of $110,000, all of the bonds secured by said several mortgages or deeds of trust hereinbefore mentioned being now outstanding; and

Whereas, The said Spencer S. Bullis, one of the parties of the first part, is the holder of a large amount of the capital stock of said railroad company, and is the owner in fee of the timber lands and real estate hereinafter particularly described, the value of which, as well as the shares of stock held by him of said railroad company, will be greatly enhanced by the construction and completion of the railroad of said railroad company; and

Whereas, The said Spencer S. Bullis and Sarah E. Bullis, his wife, by reason and in consideration of the premises, for the purpose of further securing the payment of the bonds of said railroad company, hereinafter described and hereby secured, have conveyed said timber lands and real estate in the terms hereof to the party of the second part; and

Whereas, The said railroad company is authorized by law to borrow such sums of money as may be

221 necessary for the purposes of completing and finishing and operating its railroad, and to mortgage its railroad, corporate property and franchises, which it now has or may hereafter acquire; or to convey the same by deed of trust to secure the payment of any debt contracted by the said party of the first part for the purposes aforesaid; and

Whereas, The said railroad company, its directors
222 and stockholders, for the purpose of partly meeting the expenses of constructing, completing and equipping its railroad and operating the same, which is now built and owned or hereafter to be built or acquired by it, and of providing for its outstanding obligations, and for the purpose of retiring and paying off said outstanding bonds, have duly resolved to issue the bonds of the said party of the first part, to be
223 known as its First Mortgage Five Per Cent. Gold Bonds, consisting of five hundred bonds of one thousand dollars each, numbered consecutively from one to five hundred, both inclusive, payable to said Central Trust Company, as trustee, or to the registered holder thereof; or in case said bonds are not registered, to the bearer thereof, respectively, on the first day of February in the years hereinafter designated, as follows: The bonds numbered from one to fifteen,
224 inclusive, to become due and payable February 1st, A. D. 1891, and on the first day of February in each year thereafter until all of said bonds shall be paid, the fifteen of said bonds then outstanding, bearing the fifteen lowest consecutive numbers, shall likewise become due and payable, until the first day of February, A. D., 1924, when the remaining outstanding bonds shall become due and payable, with interest on each of said bonds from the first day of February,

A. D. 1890, at the rate of five per centum per annum, 225
payable semi-annually, on the first day of February and August in each year; and that said company secure the payment of said bonds by a mortgage or deed of trust to the party of the second part, as trustee, upon its railroad, property and franchises in the terms hereof; and for that purpose have authorized and directed the officers of said railroad company to make, execute and deliver this indenture, and to 226
make, execute and deliver under the terms hereof the bonds of said railroad company to the number and in the amount hereinbefore specified, substantially in the following form, that is to say:

UNITED STATES OF AMERICA,

States of New York and Pennsylvania.

No..... $1,000.

THE ALLEGHENY AND KINZUA RAIL- 227
ROAD COMPANY.

First Mortgage Five Per Cent. Gold Bonds.

Know all Men by these Presents, that The Allegheny and Kinzua Railroad Company, a corporation created and existing under the laws of the States of New York and Pennsylvania, for value received, promises to pay to the Central Trust Company of 228
New York, as trustee, or to the registered holder hereof; or in case this bond is not registered, to bearer, on the first day of February, in the year hereinafter designated, at the office of said trust company in the City of New York, free of United States, state and municipal taxes, the sum of one thousand dollars in gold coin of the United States of America, of or equal in weight and fineness to the present standard,

229 with interest thereon from the first day of February, A. D. one thousand eight hundred ninety, at the rate of five per centum per annum, in like gold coin, payable semi-annually at the office of said trust company in the City of New York, on the first days of February and August in each year, on the presentation and surrender of the coupons annexed hereto as they severally become due; and if any default shall be made
230 in the payment of the interest upon this bond, and such default shall continue for a period of six months, the whole amount of the principal sum of this bond shall thereupon become due and payable.

This bond is one of a series of bonds of like tenor and date, consisting of five hundred bonds of one thousand dollars each, numbered consecutively from one to five hundred inclusive, the payment of the
231 principal and interest whereof is equally and ratably secured by a first mortgage or deed of trust bearing even date herewith, duly executed by said railroad company to the Central Trust Company of New York, in trust for the benefit of the holders of said bonds, upon all the railroad, property and franchises of said railroad company, including thirty thousand acres of timber land upon the construction and completion of the first forty-six miles of the railroad of
232 said railroad company, and sixteen thousand acres of timber land in addition thereto upon the construction and completion of seventy miles of the railroad of said railroad company.

Of the said series of bonds the bonds numbered from one to fifteen inclusive shall become due and payable February 1, 1891, and on the first day of February in each year thereafter, until all of said bonds

shall be paid, the fifteen of said bonds then outstanding, bearing the fifteen lowest consecutive numbers, shall likewise become due and payable, until the first day of February, 1924, when the remaining outstanding bonds shall become due and payable. 233

This bond shall pass by delivery unless the same has been registered in accordance with the provisions endorsed hereon.

This bond shall not become valid until authenticated by the certificate endorsed hereon and signed by the said trustee. 234

In witness whereof, the said The Allegheny and Kinzua Railroad Company has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary, this first day of February, A. D. one thousand eight hundred ninety. 235

THE ALLEGHENY AND KINZUA RAILROAD COMPANY,

By ....., President.

....., Secretary.

And that interest upon such bonds shall be payable on the first days of February and August in each year, and that coupons representing such interest having thereon the engraved signature of the treasurer of said railroad company which shall be as binding upon said railroad company as if such signature were in the proper handwriting of said treasurer, shall be attached to said bonds, beginning with August first, A. D. one thousand eight hundred ninety, 236

237 and substantially in the following form, viz.:

$25.00 (*Form of Coupon.*)

THE ALLEGHENY AND KINZUA RAILROAD COMPANY

Will pay at the office of the Central Trust Company of New York, in the City of New York, on surrender of this coupon, twenty-five dollars in United States
238 gold coin, on the first day of , being six months' interest then due on its first mortgage bond No. ....

....., Treasurer.

And that such bond shall be duly executed by and under the seal of said railroad company, and be signed and attested by its president and secretary; and that such bonds after such execution shall be de-
239 livered to said Central Trust Company of New York, as trustee, who shall, within the terms of said mortgage, sign a certificate endorsed upon said bonds, substantially in the following form, viz.:

TRUSTEE'S CERTIFICATE.
(To be endorsed.)

It is hereby certified that this bond is one of a series of five hundred bonds, of one thousand dollars
240 each, mentioned in the mortgage within referred to.

CENTRAL TRUST COMPANY OF NEW YORK, TRUSTEE,

By ....., Vice-President.

And that such certificate of said trustee shall be sole and conclusive proof that the bonds so certified are secured by said mortgage or deed of trust.

And that there shall be endorsed upon said bonds 241
the following provision for the registration thereof, viz.:

REGISTRATION.

This bond may be registered in the owner's name on the company's books in New York City, such registry being noted on the bond by the company's transfer agent, after which no transfer shall be valid 242
unless made on the company's books by the registered owner, and similarly noted on the bond; but the same may be discharged from registry by being transferred to bearer, after which it shall be transferred by delivery; but it may again be registered as before. The registry of this bond shall not restrain the negotiability of the coupons by delivery merely.

DATE OF REGISTRY.	IN WHOSE NAME REGISTERED	TRANSFER AGENT.	243

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And Whereas, The party of the second part has duly agreed to receive and execute the trusts of this Indenture;

Now, therefore, this Indenture witnesseth: That The Allegheny and Kinzua Railroad Company, one of the parties of the first part, in consideration of the premises and the sum of one dollar to it in hand paid by the party of the second part, at or before the en-

245 sealing and delivery of these presents, the receipt whereof is hereby acknowledged, in order to secure the payment of the principal and interest, as the same shall be payable according to the tenor of the said bonds and the coupons thereto attached, hath granted, bargained, sold, transferred, set over, assigned, aliened, released conveyed and confirmed, and by these presents doth grant, bargain, sell, transfer, set
246 over, assign, alien, release, convey and confirm unto the Central Trust Company of New York, the party of the second part, as trustee, and its successor or successors in the trust hereby created, and to its, his or their assigns, all and singular the entire line of railroad, constructed and to be constructed, of said railroad company, more particularly described as follows, that is to say:

247 All the railroad of the said The Allegheny and Kinzua Railroad Company, commencing at a point on the west branch of the New York, Lake Erie and Western Railroad, near the City of Bradford, in the County of McKean, in the State of Pennsylvania, running thence westerly to a point west of Weedsport, in the Township of Corydon, in said County of McKean, being about fourteen miles in length, be the same more or less.

248 Also all the railroad of said railroad company, one of the parties of the first part, commencing at a point on the railroad of the Western New York and Pennsylvania Railroad Company near Red House Station, in the Township of Red House, County of Cattaraugus, State of New York, running thence southerly through the Township of Red House to Gilbert in the Township of Bradford, County of McKean, State

of Pennsylvania, where said portion of said railroad last hereinbefore described connects with the first mentioned line, being about nineteen miles in length, be the same more or less. 249

Also all the railroad of said railroad company, one of the parties of the first part, commencing at Sugar Run, a point on the line of railroad first hereinbefore mentioned, in the Township of Bradford, County of McKean, State of Pennsylvania, running thence southerly through the Townships of Bradford and Lafayette, in said County of McKean, to a point on Kinzua Creek, being about twenty miles in length, be the same more or less. 250

Also a branch extending from the line of railroad first hereinbefore described at a point near Weedsport aforesaid to Corydon, on the railroad of the Western New York and Pennsylvania Railroad Company, in the Township of Corydon, in the County of Warren, and State of Pennsylvania, being about four miles in length, be the same more or less. 251

And also all branches and extensions constructed and to be constructed by said railroad company, one of the parties of the first part, aggregating about seventy miles of railroad, be the same more or less. 252

And also all tracks, sidings, side-tracks, turnouts and switches, now or hereafter to be constructed or acquired by said railroad company, for use in connection with its said railroad.

And also all the real estate, grants, ways, and rights of way, licenses and easements, all depots and depot grounds for the said railroad company, on

253 which the said railroad is situated, which are neces-
sary, useful or convenient for the use, maintenance and operation of the said railroad, whether now owned or hereafter acquired.

And also all the depots, station houses, engine houses, car houses, freight houses, car shops, machine shops, water tanks, turn tables, and all other buildings, structures or erections, and all bridges,
254 trestles, viaducts, culverts, fences, and all other structures of said railroad company, appertaining to, used or intended to be used in connection with the said railroad, hereinbefore specifically described and hereby conveyed, whether now owned or held or hereafter constructed or acquired.

And also all locomotives, engines, tenders, passenger, freight and coal cars, and all other rolling stock
255 or equipment, and all kinds of machinery and tools, and all fuel and material, and all other personal property of said railroad company, whether now held or hereafter acquired and used or intended to be used for the construction, repairing, replacing, operation and maintenance of the said railroad.

And also all the things in action, contracts, claims, and admissions of the said railroad company, whether
256 now owned or hereafter acquired in connection with or relating to the said railroad.

And also all the rights, powers, privileges, immunities and franchises of the said railroad company, including the franchise to be a corporation, whether now possessed or hereafter acquired by the said railroad company, and used or enjoyed in connection with the said railroad, together with all and singular

the tenements and appurtenances thereunto belonging, and the reversions, remainders, tolls, incomes, rents, issues and profits thereof, and all the estate, title and interest whatsoever, as well at law as in equity, of the said railroad company, of, in and to the same. 257

And this indenture further witnesseth: That the said Spencer S. Bullis and Sarah E. Bullis, his wife, parties of the first part, in consideration of the premises and the sum of one dollar to them in hand paid by the party of the second part, at or before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, in order to further secure the payment of the principal and interest, as the same shall be payable according to the tenor of the said bonds and the coupons thereto attached, have granted, bargained, sold, transferred, set over, assigned, aliened, released, conveyed and confirmed, and by these presents do grant, bargain, sell, transfer, set over, assign, alien, release, convey and confirm unto the Central Trust Company of New York, the party of the second part, as trustee, and its successor or successors in the trust hereby created, and to its, his or their assigns, all and singular the lands, real estate and premises of the said Spencer S. Bullis, one of the parties of the first part, particularly described as follows, that is to say: 258 259 260

All that certain tract or parcel of land situate in Hamilton Township, McKean County, Pennsylvania, bounded and described as follows, to wit: The north half warrant numbered five thousand five hundred and seventy-two (5572), containing six hundred and seventy-seven (677) acres of land, more or less, and

261 being same land conveyed to W. S. Weed et al. by Henry Hamlin and wife and John B. Brownly, by deeds dated March 20, 1889, and July 22, 1889, and recorded Recorder's office of McKean County, in Deed Book 49, page 121, etc., and Deed Book 50, page 323, etc.

Also all that certain piece, parcel or tract of land situated in Hamilton Township, McKean County,
262 Pennsylvania, bounded and described as follows, to wit: Beginning at a beach the southeast corner of warrant numbered five thousand five hundred and seventy-two (5572); thence west by warrant line one hundred and forty-eight and four-tenths (148 4-10) rods to a post; thence north by a line parallel with warrant line one hundred and eighty (180) rods to a post; thence east by line parallel with warrant line
263 one hundred forty-eight and four-tenths (148 4-10) rods to east line of said warrant; thence south by warrant line to place of beginning, containing 150 acres, more or less, being same land conveyed to W. S. Weed et al. by J. T. Jones and wife in 1889.

Also all that certain parcel or tract of land situate in Hamilton Township, McKean County, Pennsylvania, bounded and described as follows, to wit: Be-
264 ginning in the south line of lands now or formerly of Lorenzo D. Colton, and about one hundred seventeen and seven-ninths (117 7-9) rods from the southwest corner of said lands of Lorenzo D. Colton, which corner is on the west line of warrant five thousand five hundred fifty-six (5556); thence easterly along said south line one hundred forty-seven and two-ninths (147 2-9) rods more or less to a post the centre of said warrant; thence southerly along the

centre of said warrant one hundred thirty-six (136) 265
rods more or less; thence westerly parallel with the north line one hundred forty-seven and two-ninths (147 2-9) rod to lands now or formerly of Smith & Thompson; thence northerly along the easterly line of lands now or formerly of Smith & Thompson about one hundred and thirty-six (136) rods more or less to the place of beginning, containing one hundred and fifty (150) acres more or less, being same 266
land conveyed to W. S. Weed et al. by Margaret Foote and husband, by deed dated May 10, 1889, and recorded in McKean County records in Deed Book, Vol. 49, page 240.

Also all that certain piece, parcel or tract of land situate in Hamilton Township, McKean County, Pennsylvania, bounded and described as follows, to wit: On the north by land now or formerly of J. B. 267
& N. Barton, on the east by land now or formerly of J. Smith, on the south by land now or formerly of H. S. Southard, and on the west by warrant numbered five thousand five hundred and seventy-three (5573), containing forty-seven acres of land more or less in the western part of warrant numbered five thousand five hundred and fifty-six (5556).

Also all the following described pieces, parcels or 268
tracts of land situate in Corydon Township, McKean County, Pennsylvania, bounded and described as follows, to wit:

First. Beginning at a point the southeast corner of warrant thirty-seven hundred and three (3703) and the southwest corner of warrant thirty-seven hundred and eight (3708); thence running west along the south line of said warrant 3703 two hundred and

269 eighty-seven and two-tenths (287.2) rods to a post; thence north by line parallel with eastern line of said warrant 3703, one hundred and fifty-eight and fifty-four hundredths (158.54) rods to a post; thence west forty-eight and six hundredths (48.06) rods to a post; thence northerly one hundred sixty-six and forty-six hundredths (166.46) rods to a post in north line of warrant 3703, three hundred thirty-five and twenty-
270 eight hundredths (335.28) rods west from the northeast corner of said warrant 3703; thence east by said warrant line 335.28 rods to the northeast corner of said warrant 3703; thence south by warrant line to place of beginning, containing 633 acres more or less, and being the eastern part of warrant 3703.

Second. Beginning at stones marking the southwest corner of said warrant 3708; thence running
271 north by warrant line three hundred twenty-four and five-tenths (324.5) rods to the northwest corner thereof; thence east by warrant line seventy-seven and twenty-six hundredths (77.26) rods to a post; thence south by line parallel with warrant line eighty-nine and thirty-six hundredths (89.36) rods more or less to a post; thence east by line parallel with warrant line one hundred eighty and three-tenths (180.3) rods, more or less, to a post; thence south by line
272 parallel with warrant line twelve and twenty-five hundredths (12.25) rods, more or less, to a post; thence south 45 deg. east, seventy-seven and six-tenths (77.6) rods, more or less, to a post; thence east by line parallel with warrant line one hundred fifty-one and eighty-five hundredths (151.85) rods; thence south by line parallel with warrant line twenty-nine and one-tenth (29.1) rods more or less, to a post; thence east by line parallel with warrant line eighty

five (85) rods to post in east line of warrant 3708; 273
thence south by warrant line one hundred thirty-eight and four-tenths (138.4) rods to southeast corner of said warrant; thence west by south line of said warrant to place of beginning, containing 730 acres of land, more or less, in warrant 3708.

Third. Beginning at the northeast corner of warrant thirty-seven hundred and seventeen (3717); thence running south by east line of said warrant to 274
southeast corner thereof; thence west by south line of said warrant one hundred and seventy (170) rods, more or less, to a post; thence north by line parallel with warrant line two hundred (200) rods, more or less, to a post; thence west by line parallel with warrant line one hundred and sixty-seven and four-tenths (167.4) rods, more or less, to a post; thence north by line parallel with warrant line one hundred 275
and thirty-two (132) rods, more or less, to a post in the north line of said warrant; thence east by warrant line three hundred thirty-six and fifty-six hundredths (336.56) rods, more or less, to place of beginning, containing 490 acres of land, more or less, in warrant 3717.

Fourth. Beginning at a beech the southwest corner of warrant thirty-seven hundred and nineteen 276
(3719); thence running north by warrant line three hundred and thirty-two (332) rods to northwest corner thereof; thence east by north line of said warrant five hundred and fifty-three (553) rods to the northeast corner thereof; thence south by east line of said warrant, three hundred and thirty-two (332) rods to the southeast corner thereof; thence west by south line of said warrant two hundred and twenty-

one (221) rods, more or less, to a post; thence north by line parallel with warrant line one hundred and sixty (160) rods more or less to a post; thence west by line parallel with warrant line two hundred (200) rods, more or less, to a post; thence south by line parallel with warrant line one hundred and sixty (160) rods to a post in south line of said warrant; thence west by warrant line one hundred and twenty-eight and nine-tenths (128.9) rods, more or less, to the place of beginning, containing 941 acres, more or less, in warrant 3719.

Fifth. Beginning at the southwest corner of warrant forty-eight hundred and seventy-four (4874); thence running north by warrant line one hundred and sixty-six (166) rods to a post; thence east by line parallel with warrant line two hundred and forty-two and two-tenths (242.2) rods to a post; thence south by line parallel with warrant line one hundred and sixty-six (166) rods to a post in south line of said warrant; thence west by warrant line two hundred and forty-two and two-tenths (242.2) rods to place of beginning, containing 250 acres, and being the southwest corner of warrant 4874.

Sixth. All of warrants 4871 (1160 A), and all of warrant 4872 (1156 A), containing two thousand three hundred and sixteen (2316) acres of land.

Also all that certain piece, parcel or tract of land situate in Foster Township, McKean County, Pennsylvania, bounded and described as follows, to wit: Beginning at the southwest corner of warrant forty-nine hundred and seventeen (4917); thence running north by west line of said warrant three hundred and

thirty-three (333) rods, more or less, to the northwest corner thereof; thence east by north line of said warrant five hundred and ninety-six and three-tenths (596.3) rods, more or less, to the northeast corner thereof; thence south by the east line of said warrant three hundred and thirty-three (333) rods, more or less, to the southeast corner thereof; thence west by south line of warrant, five hundred and ninety-six and three tenths (596.3) rods, more or less, to place of beginning, being warrant 4917, and containing 2141 acres of land, more or less. 281 282

Also that certain piece, parcel or tract of land situate in Hamilton Township, McKean County, Pennsylvania, bounded and described as follows, to wit: Beginnning at the southeast corner of warrant numbered five thousand five hundred and seventy-three (5573); thence north along the east line thereof and the east line of other land north three hundred and seventy-five and seven-tenths (375.7) rods to the south line of lot number two (2), survey of 1836; thence along the south line of lots number 2, 3 and 4, same survey, south 89 deg. and 15 min., five hundred and thirty (530) rods to a post; thence south three hundred and sixty-six and fifty-five one-hundredths (366.55) rods to the southwest corner of said warrant 5573; thence along the south line thereof east five hundred and thirty (530) rods to the place of beginning, containing twelve hundred and thirty-one (1231) acres, be the same more or less, being all of said warrant numbered 5573, and the east portion of the land patented by the Commonwealth of Pennsylvania to H. E. Brown on the 18th day of September, A. D. 1883; this last described piece of land being same conveyed to W. S. Weed by J. T. Jones and 283 284

wife by deed dated September 27, 1883, and recorded in McKean County, Pa., Records in Deed Book 22, page 38, etc.

Also all of those certain pieces, parcels or lots of land situate in Hamilton Township, McKean County, Pennsylvania, being the south half of warrant number five thousand five hundred and seventy-two (5572), excepting from the same one hundred and fifty acres off the east end or part of said south half of said warrant. Conveying hereby four hundred and five acres, more or less.

Also that certain other tracts or parcels of land situate in Hamilton Township, McKean County, Pennsylvania, being part of warrant 5556, bounded and described as follows: Beginning at the northeast corner of said warrants; thence running southerly on the east line one hundred rods (100); thence westerly parallel with the north line of said warrant two hundred and sixty-six (266) rods, more or less; thence northerly one hundred (100) rods to the north line of said warrant 556; thence easterly along warrant line two hundred and sixty-six (266) rods, more or less, to the northeast corner thereof, the place of beginning, containing one hundred and sixty-six and two-tenths (166.2) acres of land, more or less; the said last two described pieces of land being same conveyed to W. S. Weed by Irving W. Beam, executor of the estate of Jeremiah Beam, deceased.

All all those certain pieces, parcels or lots of land situate, lying and being in the Townships of Bradford and Corydon, McKean County, Pa., bounded and described as follows: Beginning at a post the north-

east corner of warrant 3423 and the southeast corner 289
of warrant 3424; thence south four hundred and ninety-one perches to a post; thence west five hundred and eighty-one perches to a post; thence north fifty-eight and three-tenths perches to a post in the east line of warrant 4876; thence west five hundred and forty-five perches to a post in the west line of warrant 4876; thence north four hundred and eighty-five perches to the northwest corner of warrant 4875; 290
thence east five hundred and forty-five perches to the northeast corner of warrant 4875; thence south three hundred and eighty-nine and three-tenths perches to southwest corner of warrant 3423; thence east by said warrant line three hundred perches to the place of beginning, containing twenty-nine hundred and eighty-two and forty-two one-hundredths acres, be the same more or less.

291

Also those certain pieces or parcels of land situate in Hamilton Township, McKean County, Pennsylvania, described as follows, to wit:

First. Subdivisions numbers 125, 127 and 128 of warrant No. 2396, bounded as follows, to wit: Beginning at a post in the north line of warrant No. 2396 and 226 rods west from the northeast corner of said warrant; thence south parallel with east line of 292
said warrant 197.5 rods to a post; thence east parallel with north line of said warrant 226 rods to a post in east line of said warrant; thence south along east line of said warrant 184.7 rods to a post the southeast corner of said warrant; thence west along south line of said warrant 450.5 rods to a post, the southern corner of said warrant; thence north along west line

293 of said warrant 382.5 rods to a post, the northwest corner of said warrant; thence east along north line of said warrant 225 rods to a post, the place of beginning, being subdivision No. 125, containing 277.64 acres, more or less, and subdivision No. 127, containing 261.03 acres, more or less, and also subdivision No. 128, containing 259.15 acres, more or less.

294 Second. Subdivisions Nos. 123, 124 and 130 of warrant No. 2550, bounded as follows, to wit: Beginning at a post the northeast corner of warrant 2550; thence south along east line of said warrant 198 rods to a post; thence west parallel with south line of said warrant 221 rods to a post; thence south parallel with east line of said warrant 184.5 rods to a post, in the south line of said warrant; thence west along south line of said warrant 224.5 rods to a post, 295 the southwest corner of said warrant; thence north along west line of said warrant 383 rods to a post, the northwest corner of said warrant; thence east along north line of said warrant 445.5 rods to a post, the northeast corner of said warrant, the place of beginning, being subdivision No. 123, containing 277.39 acres, more or less, and subdivision No. 124, containing 273.27 acres, more or less, and also subdivision No. 130, containing 259.75 acres, more or less.

296 Third. All that piece or parcel of warrant 4913, bounded as follows, to wit: Beginning at the northeast corner of said warrant 4913; thence southerly along east line thereof 336 rods to the southeast corner thereof; thence westerly along south line of said warrant 276½ rods to the southwest corner thereof; thence northerly along the west line of said warrant 336 rods to the northwest corner thereof;

thence east along north line of said warrant 110 rods and 9 18-20 feet to a post; thence south 160 rods to a post; thence east 55 rods 4 19-20 feet to a post; thence north 160 rods to a post in the north line of said warrant 110 rods and 9 18-20 feet to the northeast corner of said warrant, the place of beginning, containing 525.36 acres strict measure, be the same more or less. 297

Also all those certain pieces or parcels of land situate in Corydon Township, McKean County, Pennsylvania, described as follows, to wit: Warrants Nos. 3710, 3712, 3718, 3699, 3706, 3734, 3711, excepting and reserving therefrom 200 acres from the east side of the same, owned and occupied by Moses J. Johnson, containing 7,732 acres, be the same more or less. Also 400 acres off from the east end of warrant 3702. Also all of warrant 3714, and also all of warrant 3731, excepting and reserving therefrom 100 acres of land from warrant 3714, and 300 acres of land from 3731, and containing in both warrants 1900 acres, be the same more or less. 298 299

Also all those certain tracts of lands situate, lying and being in the Township of Foster (formerly Bradford), County of McKean, and State of Pennsylvania, and designated on map of said county as warrants Nos. four thousand three hundred and thirty-six (4336) and four thousand three hundred and thirty-five (4335), excepting and reserving, however, four hundred (400) acres from warrant four thousand three hundred and thirty-six (4336), heretofore conveyed to Daniel Kingsbury, and also excepting and reserving fifty (50) acres of land from the southeast corner of warrant No. four thousand three hundred 300

301 and thirty-five (4335), heretofore conveyed to Caroline S. Miller, containing eighteen hundred (1800) acres of land, be the same more or less. Also excepting and reserving about eighty (80) acres off of the west part of both of said warrants heretofore sold to Peter T. Kennedy.

Also all that certain tract of land situate in the Township of Corydon, County of McKean, and State
302 of Pennsylvania, being warrant No. 3722, containing 1166.66 acres.

Also all that certain other piece or parcel of land situate in Township of Corydon, County of McKean, and State of Pennsylvania, bounded and described as follows, to wit: On north by warrant No. 3722, east by warrant No. 3733, on south and west by lands conveyed by R. R. Connolly et al. to E. B. Holmes, by
303 deed dated July 31, 1880, containing 300 acres, and being the northeast part of warrant 3732.

Also all that other tract or parcel of land situate in the Town of Red House, County of Cattaraugus, and the State of New York, and also known as Township one (1), Range seven (7), of the Holland Company's Survey, the following lots: Nos. 41, 42, 43, 34, 35, 25, 27, 33, 18, south one-half of 26, containing
304 3112 5-11 acres, more or less.

The total amount of lands and real estate hereinbefore described and hereby conveyed being thirty thousand nine hundred fifty-four and nineteen one-hundredths (30,954.19) acres, be the same more or less.

Excepting and reserving, however, from this conveyance until default shall have been made by said

raliroad company in the performance of all and singu- 305
lar the covenants and agreements of this indenture and of the bonds and coupons herein mentioned, all lumber, timber, wood and bark, with the right to the said Spencer S. Bullis, his heirs, executors, administrators and assigns, to enter upon the said lands and premises, or any portion thereof, at any time, for the purpose of cutting down, removing and taking away any and all trees, timber, lumber, wood and bark; and 306
also excepting and reserving from this conveyance all oil, petroleum, gas, coal, or other minerals upon or in said lands and real estate, and also excepting and reserving the right to enter upon said lands for the purpose of drilling or mining for said oil, petroleum, gas, coal or other minerals, or for the erection and operation of mills or other machinery for the manufacture or handling of lumber or other products of the forest. Provided, however, that the foregoing 307
exceptions and reservations shall cease and determine whenever said railroad company shall make such default, whereupon, all right, title, property, license, easement or privilege of the said Spencer S. Bullis, his heirs, executors, administrators or assigns, in and to or upon all and singular said lands and premises by reason of said exceptions and reservations shall cease and determine, anything to the contrary herein 308
contained notwithstanding, and the same shall at once vest absolutely in the said trustee, the party of the second part hereto, its successor or successors, as fully as if none of said exceptions and reservations had ever been made, and the said trustee shall thereupon have and possess full power and authority to avail itself of, and shall be entitled to receive all the benefits and profits of any and all contracts or agree-

ments which may have been at any time theretofore made by the said Spencer S. Bullis, his heirs, executors, administrators or assigns, under or by virtue of any of said exceptions or reservations, or in any way relating to any lumber, timber, wood, bark or other product of the forest, or any coal, iron, oil, petroleum or other mineral upon, in or under said lands and premises hereby conveyed, as fully as if the same had been made for the sole benefit of the party of the second part, its successor or successors, as trustee for the holders of said bonds and coupons.

To have and to hold all and singular the above described railroad, property, premises, ways, rights of way, real estate, grants, licenses and easements and other property, real and personal, in any way appertaining to said railroad, with the appurtenances and the corporate rights, powers, privileges, immunities and franchises aforesaid, and all and singular the above described lands and real estate, with the appurtenances thereunto appertaining, unto the said party of the second part hereto, as trustee, and its successor or successors in such trusts and uses, and its, his or their assigns.

But in trust, nevertheless, for the equal benefit and security of all and every person, copartnership, firm or corporation that shall be or at any time become holders of the said bonds, or such of them as shall be issued by the said railroad company, without preference, prioity or distinction as to lien or otherwise, of any of the said bonds over the others, by reason of priority in the time of issuing or negotiating the same; so that each and all of said bonds issued and to be issued as aforesaid shall have the same right,

lien and privilege, under and by virtue of this mort- 313
gage, and shall be equally secured hereby with the like effect as if they had been made, executed, delivered and negotiated simultaneously with the delivery hereof.

And this indenture further witnesseth, that the said railroad company, one of the parties of the first part, hereby covenants and agrees to and with the party of the second part, and to and with the respec- 314
tive persons, copartnerships, firms and corporations that shall hold the bonds to be secured hereby, as follows, to wit:

First. That the said railroad company shall not issue, negotiate, sell or otherwise dispose of the bonds to be issued hereunder in any manner not consistent with this instrument and its covenants and agreements in that behalf contained. 315

Second. That this mortagge shall be a security for the whole or any part of the five hundred thousand dollars at par value of said bonds which may be issued hereunder at any time while this mortgage remains in force; and in case the full amount of such bonds shall not be issued and negotiated this mortgage shall be a security for such portions of said bonds as shall be issued and negotiated hereunder, 316
and all bonds so issued and negotiated shall be equally secured by this mortgage without regard to the time when such bonds may be issued.

Third. That the said railroad company shall pay to the lawful holders of the bonds hereby secured the principal and interest therein agreed to be paid, at the time and upon the terms and conditions therein mentioned upon the surrender at the office of said

trust company in the City of New York of said bonds or the interest coupons thereto attached, and shall pay said interest free of any and all taxes which may be imposed thereon by or under the laws of the United States or of the States of New York and Pennsylvania, or either of them, or by any county, village, city or other municipality; but the said party of the first part shall not be required to pay any income or property taxes which may be levied or assessed against the holders of said bonds or coupons.

Fourth. That the proceeds of said bonds shall be applied in good faith to the completing, finishing, equipping and operating its said railroad and providing for its outstanding obligations.

Fifth. That in no case shall any claim, benefit or advantage be set up or taken by said railroad company, its successors or assigns, of any stay, valuation, appraisement, extension, redemption, or relief laws, to prevent any entry upon or sale of the premises and property hereby conveyed or intended to be conveyed, or any sale under judgment or decree of any court in a suit for foreclosure of this mortgage, or the sale of the mortgaged premises, or putting the purchaser at any such sale into full and final possession of the mortgaged premises; and the party of the first part hereby expressly waives the benefit of any such law or laws, and any and all rights of redemption which it might or could otherwise have under any present or future laws of any state or states, upon or after such entry or sale.

Sixth. That one hundred ten of said bonds, numbered from one to one hundred ten inclusive, amounting in the aggregate to $110,000, at par

value, shall be set apart, reserved and appropriated 321
for the purpose of retiring or providing for by exchange or otherwise the said outstanding bonds of said Bradford and Corydon Railroad Company, and secured by said several mortgages or deeds of trust upon its railroad, property and franchises; and that the said bonds so set apart, reserved and appropriated shall be used for such purposes and none other, and shall not be certified or delivered except in ex- 322
change for said bonds of said Bradford and Corydon Railroad Company, except in case of the sale of said bonds so set apart, reserved and appropriated for a sum sufficient to retire said bonds of said Bradford and Corydon Railroad Company; and that the bonds so set apart, reserved and appropriated for the purpose of retiring or providing for said bonds of said Bradford and Corydon Railroad Company are not to be used or exchanged therefor at a greater rate than 323
at the rate of dollar for dollar, that is to say, none of the bonds so set apart, reserved and appropriated are to be used in exchange for less than an equal amount of the said bonds of the said Bradford and Corydon Railroad Company; that three hundred ninety of said bonds, numbered from one hundred eleven to five hundred, inclusive, amounting in the aggregate to $390,000 at par value, shall be set 324
apart, reserved and appropriated for the purpose of retiring or providing for, by exchange or otherwise, the bonds heretofore issued by said Allegany and Kinzua Railroad Company, and secured by said mortgage or deed of trust upon its railroad, property and franchises; and that the said bonds so set apart, reserved and appropriated shall be used for such purpose and none other, and shall not be certified or de-

325 livered except in exchange for the bonds so issued by the said Allegany and Kinzua Railroad Company, except in case of the sale of said bonds so set apart, reserved and appropriated for a sum sufficient to retire said bonds so issued by the said Allegany and Kinzua Railroad Company; and that the said bonds so set apart, reserved and appropriated for the purpose of retiring, by exchange or otherwise, the said
326 bonds of the Allegany and Kinzua Railroad Company are not to be exchanged or used therefor at a greater rate than at the rate of seventy-eight per cent. in the bonds secured hereby for each bond of the said Allegany and Kinzua Railroad Company, but any surplus of bonds, or any premiums received from sales of bonds so set apart, reserved and appropriated beyond what shall prove to be necessary for the purpose of providing for and retiring said out-
327 standing bonds, so to be retired or provided for, shall be delivered and certified to the said railroad company, one of the parties of the first part.

Provided, however, that if the bonds issued hereunder before such exchange shall be worth in the aggregate more than the bonds to be exchanged therefor or to be paid or retired thereby, then the
328 said railroad company shall have the right to fix the terms of said exchange and the right, upon a resolution of its Board of Directors or Executive Committee, to sell any of the bonds so set apart, reserved and appropriated for cash at not less than the market value thereof, and in case of such sale the party of the second part shall certify and deliver the bonds sold upon receiving the proceeds of such sale, and shall use the proceeds of such sale exclusively for the

purpose of retiring or providing for said outstanding 329
bonds as hereinbefore specified.

Seventh. That the said railroad company shall cause to be conveyed to said trustee, in such manner as said trustee, its successor or successors, may require, in addition to the thirty thousand acres of timber land, conveyed to said trustee by this indenture, sixteen thousand acres of timber land in addition thereto, as a further security for the payment 330
of the said bonds secured hereby, whenever and as soon as said railroad company has completed the construction of seventy miles of its railroad.

Eighth. That the said railroad company shall at all times permit the said trustee, or the holders of any ten of the bonds secured thereby, to examine all books of account, vouchers or other books and 331
papers, showing its earnings and expenditures in the maintenance and operation of said railroad.

Ninth. That the said railroad company shall, upon reasonable request, make, do, execute, and deliver any further acts, deeds, conveyances and assurances, which may be necessary or proper for the better assuring unto the said trustee the premises, property, railroad, equipments, lands, real estate and ap- 332
purtenances, rights, franchises, interests and effects, hereby mortgaged, or inteded so to be, whether now owned or possessed, or hereafter to be acquired by said party of the first part, or for carrying out the purposes and objects of this instrument.

And it is hereby declared, that the trusts, uses, purposes, agreements and conditions upon which the

premises, railroad, lands, real estate, ways, rights of way, licenses, easements and other property, real and personal, aforesaid, and the corporate franchises, rights, powers, privileges and immunities aforesaid, are conveyed to and are to be had, held, and disposed of by the said party of the second part, and subject to which agreements and conditions the bonds secured by this indenture are to be issued, and are to be received and held by each and every holder of such bonds, are as follows, to wit:

ARTICLE I.

THIS INDENTURE is upon the express condition that if the said railroad company, its successors or assigns, shall and do well and truly pay, or cause to be paid, unto the person or persons, partnerships, firms, and bodies corporate or politic, who shall become holders of the bonds intended to be secured hereby, the several and respective sums expressed therein, on the day and time hereinbefore mentioned for payment thereof, together with the lawful interest of the same, according to the provisions of the said obligations or bonds, or in accordance with the provisions hereof, and shall well and truly keep and perform all the stipulations, covenants, agreements and things herein required to be kept and performed by the said party of the first part, according to the true intent and meaning of these presents, without any fraud or delay, then and from thenceforth, as well as this indenture and the estates and property hereby conveyed, or hereby agreed so to be, as said recited obligations shall become void and of no effect, anything hereinbefore contained to the contrary

thereof notwithstanding, and satisfaction shall be 337
forthwith duly entered by the trustee upon the record of this indenture of mortgage; otherwise the same shall be and remain in full force and virtue.

ARTICLE II.

Until default shall have been made by said railroad company in the performance of all and singular the covenants and agreements of this indenture, and of 338
the bonds herein mentioned; and until any such default shall have continued for a period of six months, the said party of the first part shall be suffered and permitted to possess, manage, operate and enjoy the said hereinbefore described franchises, property and railroad, and every part thereof, with the equipment thereof and the appurtenances thereunto belonging, and to take and use the tolls, incomes, rents, issues 339
and profits thereof, in the same manner and with the same effect as if this indenture had not been made.

ARTICLE III.

In case default shall be made in payment of any of said coupons, or semi-annual interest upon any of the aforesaid bonds, at the time and in the manner required by the coupons issued therewith, provided the said coupon has been presented, and in case such de- 340
fault shall continue for the period of six months after the said coupon shall have become due and payable, and after the payment of the interest therein specified has been demanded at the office of the said Central Trust Company of New York; or in case default shall be made in the payment of any of said bonds as they shall become due in accordance with the terms there-

of and of this instrument; or if the said railroad company shall suffer or allow any taxes or charges to fall in arrear, whereby the security of this mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants and stipulations herein, or in said bonds contained on its part to be kept and performed; then and thereupon the principal of all the bonds secured hereby shall become immediately due and payable, anything contained in the said bonds to the contrary notwithstanding.

Provided that said trustee give a written notice to the party of the first part, its successors or assigns, of its option to that effect while such default continues, such notice to be given only in case said trustee shall be requested in writing to do so by the holders of fifty per centum of the said bonds outstanding.

ARTICLE IV.

In case default shall be made in the payment of any interest, or of any of the aforesaid bonds, or in the payment of the coupons thereto annexed according to the tenor thereof, upon demand made of such payments at the office of the Central Trust Company of New York, or if the said railroad company shall suffer or allow any taxes or charges to fall in arrear, whereby the security of this mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants and stipulations herein or in said bonds contained, on its part to be kept and performed; and in case any such default shall continue for a period of six months, the said trustee, the party of the second part, personally or by its attorney or

agent, may and upon the request in writing of a ma- 345
jority in interest of the holders of said bonds, and upon being properly indemnified against costs and expenses which may be incurred by acting in pursuance of such request, shall enter into or upon all and singular the railroad and premises hereby conveyed or intended to be conveyed, and each and every part thereof, and have, hold and use the same, operating by its managers or servants, or other attorney or 346
agents, the said railroad, and lands and premises, conducting the business thereof, and making from time to time all repairs or replacements, and such useful alterations, additions and improvements thereto as may seem judicious; and collect and receive all the tolls, freights, incomes, rents, issues and profits of the same, and of every part thereof, and after deducting the expenses of operating the said railroad and conducting the business, and of all said repairs, re- 347
placements, alterations, additions and improvements, and all payments which may be made for taxes, assessments, charges or liens prior to the lien of these presents, upon the said railroad, property and franchises, or any part thereof, and compensation for its service, apply the moneys arising as aforesaid to the payment of interest upon said bonds, and to interest upon such delayed interest, in the order in which said interest shall have become or shall become due, rat- 348
ably to the persons holding the coupons evidencing the right to such interest; and after paying all interest which shall have become due, shall apply the same to the satisfaction of the principal of the said bonds which may at that time be due and unpaid, ratably and without discrimination or preference. In case all the said payments shall have been made in full,

and no suit to foreclose this mortgage shall have been begun or sale made as hereinafter provided, the said trustee, after making such provision as to it may seem advisable for the payment of any semi-annual installment of interest next to fall due, shall restore the possession of the premises hereby conveyed to the said party of the first part, its successors or assigns, provided that if any of the defaults hereinbefore specified be subsequently made, such restoration shall not, nor shall any previous entry be construed to exhaust or in any manner impair the power of entry or any power hereby granted to or conferred upon the said trustee.

ARTICLE V.

In case any default shall be made as aforesaid, and in case any such default shall contiue for the period of six months after demand made as aforesaid for stich payment, or if the said railroad company shall suffer or allow any taxes or charge to fall in arrear whereby the security of this mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants and stipulations herein or in said bonds contained on its part to be kept and performed, it shall then, but not sooner, be lawful for the said trustee, the party of the second part, after entry as aforesaid or other entry, or without entry, personally or by its attorney or agent, upon the request in writing of a majority in interest of the holders of said bonds, to sell and dispose of all and singular the railroad and premises hereby conveyed, or intended so to be, or of any part of the same, from time to time, at public auction, in the City of New York, or at such

other place or places, and at such time or times as it 353
may appoint, having first given notice of the time and place of such sale or sales, by advertisement, to be published at least once a week for six successive weeks, in one or more newspapers published in the City of New York, and one or more newspapers published in the County of Cattaraugus, in the State of New York, and one or more newspapers published in the County of McKean, in the State of Pennsyl- 354
vania; and to adjourn the said sale or sales from time to time in its discretion; and, if so adjourned, to make the same at the time and place to which the same may have been so adjourned without further notice; and upon any such sale, to make and deliver to the purchaser or purchasers of the property so sold, good and sufficient deed or deeds of conveyance in fee simple, in the law, for the same, and deliver possession thereof; and such sale, made as aforesaid, shall be a 355
perpetual bar, both in law and equity, against the said railroad company, its successors or assigns, and all other persons whatsoever lawfully claiming or to claim the said railroad and premises so sold, or any part thereof, by, from, through or under it. After deducting from the proceeds of any such sale just allowances for all disbursements and expenses of the said sale, including attorneys' and counsel fees and all 356
other expenses, advances or liabilities which may have been made or incurred by the said trustee in operating or maintaining the said railroad, or in managing the business of the same while in possession, and all payments which may have been made by it for taxes or assessments on the said premises, or any part thereof, as well as reasonable compensation for its own services, the balance remaining of the said

357 proceeds shall be applied to the payment (in full or pro rata, as such net proceeds shall suffice), in the first instance of all unpaid coupons due at the time of or prior to the time of the maturity of the latest paid coupons upon any of the said bonds, and thereafter to the payment of the principal and interest due or unpaid upon said bonds then outstanding, without discrimination, as between principal and interest, in full,
358 if such proceeds shall suffice for that purpose, but if not, then ratably, and without preference; it being the intention of this indenture, that, as long as the said railroad and the other property shall be managed by the trustee and remain unsold, the income shall be applied to the payment of interest in preference to the principal; but after a sale of the said railroad and its appurtenances, no such preferences shall be made in the distribution of the proceeds, except as herein-
359 before provided. If, after satisfaction thereof, a surplus of the said proceeds shall remain, the same shall be paid over to the said railroad company, or to whomsoever may be lawfully or equitably entitled to receive the same, or as some court of competent jurisdiction shall direct. In the event of the party of the second part making such entry upon or taking possession of the railroad property, real and personal, hereby conveyed or intended to be conveyed,
360 or in the event of any sale thereof, either by the trustee or by judicial proceedings, as hereinbefore mentioned, then, in either case, the whole principal sum of each and all the said bonds then outstanding and intended to be hereby secured shall forthwith become due and payable, although no notice may have been previously given by the said trustee of its option to that effect, as hereinbefore provided. And it is hereby

declared and agreed that the receipt of the said trustee shall be sufficient discharge to the purchaser or purchasers of the property sold as aforesaid, for his or their purchase money, and that he or they shall not, after payment thereof, and having such receipt, be liable to see the application of such purchase money, or be in any manner answerable for any loss or misapplication or non-application of the same, or any part thereof. 361

362

ARTICLE VI.

The provision in the fifth article is cumulative to the ordinary remedy by foreclosure in the courts, and the trustee herein may, at its discretion, and shall, upon the written request of the holders of a majority in amount at par value of the outstanding and unpaid bonds which may have been issued hereunder, and upon being properly indemnified, and whenever entitled to do so by the terms hereof, institute proceedings to foreclose this mortgage, whenever the holders of a majority in value of said outstanding and unpaid bonds may direct, and, in the absence of any such direction, then as the said trustee may deem expedient. 363

Provided always, and it is hereby expressly declared and agreed that no holder or holders of a bond or of any bonds secured hereby shall have the right to institute any suit, action or proceeding in equity or in law for the foreclosure of this mortgage or the execution of the trusts thereof, or for the appointment of a receiver, or for any other remedy, without 364

365 first giving notice in writing to the trustee herein of default having occurred and continued as aforesaid, and unless the holders of a majority in amount at par value of the bonds then outstanding have made request in writing to the said trustee, as above provided, and have afforded it a reasonable opportunity to proceed to exercise the powers hereinbefore granted, or to institute such action, suit or proceed-
366 ing in its own name, and have also offered adequate security and indemnity against the costs, expenses and liabilities to be incurred therein or thereby; and such notification, request or offer of indemnity are hereby declared to be conditions precedent to the execution of the powers and trusts of of this indenture and to any action or cause of action for the foreclosure of this mortgage, for the appointment of a receiver, or for any other remedy hereunder. And
367 provided also, that neither the trustee, nor the holder or holders of the bonds intended to be hereby secured, or any of them, shall sell the premises hereby mortgaged, or intended to be, or any part thereof, or institute any suit, action or proceeding, in law or equity, for the foreclosure hereof, or for the appointment of a receiver, otherwise than in the manner herein provided.

368 The trustee shall have the right to require the person or persons presenting any request, as hereinbefore provided, to furnish proof by affidavits of the signers as to the ownership of the bonds represented by him or them, and if such proof be so required the said request shall be without effect until such proof shall have been furnished.

ARTICLE VII. 369

At any sale of the aforesaid property, railroad, appurtenances and franchises, or of either or any part thereof, whether made by virtue of any power herein granted, or by judicial authority, the trustee, if requested so to do in writing by the holders of a majority in interest of all the bonds then outstanding, and if to its satisfaction indemnified, may bid for and purchase the same, or cause to be bid for and pur- 370
chased the same, for and on behalf of all the holders of the bonds hereby secured, and then outstanding, in the proportion of the respective interests of such bondholders, at a reasonable price, if but a portion thereof be sold, or if the whole of said mortgaged premises should be sold, at a price not exceeding the total amount of such bonds outstanding, with the interest accrued thereon and the expenses of such sale. In case of the sale of the mortgaged premises or any 371
part thereof, either by the trustee or in the course of judicial proceedings as hereinbefore provided, the purchaser or purchasers at such sale in making payment of the purchase money and making settlement thereof, after making a cash payment sufficient to cover the costs and expenses of the sale and all other charges which must be provided for in actual cash, shall have the right to deliver and pay to the trustee. 372
and turn in and use toward the payment of the purchase money, any of the bonds or coupons held by him or them, to or toward the payment of which the net proceeds of such sale shall be legally applicable;

373 the amount of such bonds or coupons so to be paid to be determined and fixed by the trustee, and at a sum which shall, upon a proper distribution and accounting for such proceeds, be at least equal to the share or proportion payable out of such net proceeds to the purchaser or purchasers as the holder or holders of such bonds or coupons. And in the event of the purchase of the whole property as aforesaid, by said
374 trustee, the right and title thereto shall vest in said trustee, in trust for the purchasers, and each holder of bonds or coupons shall have an interest in the property so purchased in the proportion that his bonds and coupons bear to the entire issue of bonds and coupons outstanding; and the said trustee shall take such lawful measures as may be deemed necessary to organize a new company for the operation of said railroad for the benefit of those for whom the
375 purchase was so made; and the trustee so purchasing shall make such conveyance or conveyances of the premises so purchased, except said timber lands, to such new corporation as may be deemed necessary; and said trustee shall sell timber lands for the benefit of the holders of bonds or coupons as their respective interests may appear.

376 ARTICLE VIII.

A majority in interest of the holders of all the bonds secured hereby then outstanding shall have the right and power, by an instrument in writing under their hands, to instruct and require the trustee herein to exercise any option or privilege hereby conferred upon it in respect to entering into or upon the mortgaged premises or foreclosing the same, or

selling the same, or in respect to any other act to be 377
done by said trustee hereunder, or to waive the rights so to do, and also the right and power to revoke or annul the exercise of any such option or privilege which shall have been made by said trustee in the premises, and the said trustee shall act accordingly.

ARTICLE IX.

It is mutually agreed that the terms or words 378
"trustee," and "said trustee," as used in this indenture, shall be held and construed to mean the trustee or trustees for the time being, and to include the successorr or successors of the said party of the second part.

ARTICLE X.

The trustee shall at all times have full power and 379
authority, to be exercised in its own discretion and not otherwise, to release and convey to any party or parties who may be designated in writing by the party of the first part to receive the same, or to release from the lien and operation of these presents, in such manner as the trustee may deem proper, any portion of the premises hereinbefore granted which may be appurtenant to the said railroad or any part thereof, but which, in the opinion of the trustee, shall 380
not be neecssary for use in connection therewith, and which shall have been acquired or held for stations, depots, shops or other buildings, or for a supply of fuel, gravel or other material, or for any other purpose, and also to convey and release as aforesaid, on like request, any lands not occupied by the track which may become disused by reason of a change of location of any station house, depot, shop, or other

381 building, as the party of the first part may deem expedient to disuse or abandon, by reason of such change; and the trustee may consent to any changes in the location of the track, or of any station houses, depots, shops or other buildings which, in the judgment of the party of the first part, shall have become expedient, and make and deliver the instruments necessary or proper to carry the same into effect; but
382 any lands which may be acquired for permanent use, in substitution for any so released, shall be conveyed to the trustee upon the trusts of these presents; and the proceeds of any and all lands and premises for which others, or property of equal value, shall not, within a reasonable time, be required to be substituted, shall be paid over to the trustee to be by it applied to the purchase or redemption of bonds hereby secured and then outstanding, which bonds shall,
383 when so purchased or redeemed, be cancelled and surrendered to the party of the first part; and the trustee shall also have full power to allow the party of the first part from time to time to dispose of, according to its discretion, such portion of the machinery, tools, implements and materials which shall at any time be acquired or held for the use of said railroad, and shall have become unfit or unnecessary for
384 use; but any and all new or other machinery, tolls, implements and material which may be required in substitution for any so released, shall, by virtue and force hereof, become and be, immediately upon the acquisition thereof, subject to the lien and operation of these presents, without any new conveyance or transfer or other act or proceeding whatsoever, and th proceeds of all sales of machinery, tools, implements or materials acquired or held for use on said

railroad, which may not be invested in new or other machinery, tools, implements or material for use in connection with said railroad, shall be paid over to the trustee, to be by it applied to the purchase or redemption of bonds hereby secured and then outstanding, as hereinbefore provided. 385

The said trustee shall also have full power and authority to, and said trustee shall, release from the lien and operation of these presents any portion or portions of the said timber land and real estate hereinbefore described, upon the payment to said trustee, to be applied to the purchase or redemption of the bonds hereby secured and then outstanding of the value of such portion of said timber land and real estate so to be released; such value to be determined by a majority of a board of arbitrators, consisting of three persons, of whom the trustee shall, upon the request in writing of said railroad company, or of said Spencer S. Bullis, his heirs, executors, administrators or assigns, appoint one, and the said Spencer S. Bullis, his heirs, executors, administrators or assigns shall appoint a second, and the two arbitrators thus appointed shall select a third, and a majority of the three arbitrators so appointed shall have full power to fix and determine the amount of money to be paid to said trustee upon the release of said portion or portions of said timber land and real estate from the lien and operation of these presents; and the said trustee shall not be required to go behind the certificate in writing of a majority of said board of arbitrators, and the same shall be complete authority to said trustee to release the same as aforesaid. It is understood, however, that the said trustee shall not 386 387 388

389 be required to incur any liability for services or expenses to said board of arbitrators, or any of them, and the said trustee is hereby authorized to first apply the moneys coming into the hands of said trustee to defraying the expenses of such arbitration, including the services of said arbitrators, before applying any portion of said money to the purchase or redemption of said bonds.

390 ARTICLE XI.

It is hereby declared to be a condition upon which the said party of the second part, and its successor or successors in the trusts hereby created, have assented to these presents and accepted the trusts thereby created, that the said trustee shall not in any manner be held responsible for persons employed by it when selected with reasonable care, nor shall the said trus-
391 tee be answerable except for its own wilful default; and in all cases the said trustee, the party of the second part, shall be authorized to pay such reasonable compensation as it shall deem proper to the counsel, attorney, agents, servants and employees whom it may reasonably employ in the administration or management of this trust; and the said trustee and its successor or successors shall have and be entitled to
392 just compensation for all services which it or they may render in connection with the administration or management of the trusts hereby created, to be paid by the said party of the first part, out of the trust estate. The party of the second part shall not be under any obligation to take any action towards the execution of this trust which in its opinion will be likely to involve in it personal expense or liability, unless one or more of said bondholders shall, as often

as required by said trustee, give it reasonable indemnity against the same, anything herein to the contrary notwithstanding. The said trustee may resign and discharge itself of the trust hereby created, by notice in writing to the party of the first part, to be given at least three months before such resignation shall take effect, or such shorter time as the party of the first part shall accept as adequate. 393

ARTICLE XII. 394

It is expressly agreed by and between the said parties hereto, for the guidance and protection of the said trustee in the certification and delivery of bonds hereunder,, that said bonds are to be certified and delivered by said trustee to the party of the first part by said trustee upon the written application of the party of the first part, expressed through its president and secretary or treasurer under its corporate seal, wherein it shall be stated what amount of bonds are required at the time, and the person to whom the same are to be delivered, which requisition shall be full protection, warrant and authority to the said trustee, to certify and deliver the said bonds pursuant thereto, and to make and sign the certificates endorsed upon said bonds and each of them, and no duty is imposed upon said trustee to look behind such requisition before certifying and delivering the said bonds. 395 396

In witness whereof, the said Allegheny and Kinzua Railroad Company, and the said Central Trust Company of New York, have caused their respective seals to be hereunto affixed, duly attested, and these presents to be subscribed by their respective presidents

397 and secretaries, and the said Spencer S. Bullis, and Sarah E. Bullis, his wife, have hereunto set their hands and seals the day and year first hereinbefore written.

THE ALLEGHENY & KINZUA RAILROAD COMPANY.

[Seal.] By SPENCER S. BULLIS, President.

398 SPENCER S. BULLIS. [Seal.]

SARAH E. BULLIS. [Seal.]

Attest:

LEWIS F. WILSON, Secretary.

CENTRAL TRUST COMPANY OF NEW YORK.

[Seal.] By F. P. OLCOTT,

399 President.

Attest:

C. H. P. BABCOCK,

Secretary.

STATE OF NEW YORK, } ss.
CITY AND COUNTY OF NEW YORK. }

400 Be it remembered that on this 27th day of February, A. D. one thousand eight hundred and ninety, before me, the subscriber, personally appeared Spencer S. Bullis, the President, and Lewis F. Wilson, the Secretary, of the Allegheny and Kinzua Railroad Company, to me well known, who, being by me severally duly sworn, did each for himself depose and say: the said Spencer S. Bullis that he is the President, and the said Lewis F. Wilson that he is the Secretary, of the said The Allegheny and Kinzua Rail-

road Company and that he knows the corporate seal 401
of said railroad company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said company, and that he signed his name thereto as such officer by like order of said board; and they severally acknowledged to me that the same was so done as the act and deed of the said company.

Witness my hand and official seal the day and year 402
above written.

[Seal.] T. HENRY DEWEY,
Notary Public,
Kings County.

Cert. filed in New York Co.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } ss.

403

Be it remembered that on this 27th day of February, A. D. one thousand eight hundred and ninety, before me, the subscriber, personally appeared Spencer S. Bullis and Sarah E. Bullis, his wife, to me well known to be the same persons described in and who executed the foregoing instrument, and they severally acknowledged to me that they executed the same.

404

Witness my hand and official seal the day and year above written.

[Seal.] T. HENRY DEWEY,
Notary Public,
Kings County.

Cert. filed in New York Co.

405

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } ss.

I, Edward F. Reilly, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said city and county, the same being a Court of Record, do hereby certify that T. Henry Dewey has filed in the Clerk's Office of the County of New
406 York a certified copy of his appointment as Notary Public for the County of Kings, with his autograph signature, and was at the time of taking the proof or acknowledgment of the annexed instrument, duly authorized to take the same; and further, that I am well acquainted with the handwriting of such notary, and verily believe the signature to the said certificate of proof or acknowledgement to be genuine.

407 In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county the 7th day of March, 1890.

EDWARD F. REILLY,
Clerk.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } ss.

Be it remembered that on this 7th day of March,
408 A. D. one thousand eight hundred and ninety, before me, the subscriber, personally appeared Frederick P. Olcott, the President, and Chas. H. P. Babcock, the Secretary of the Central Trust Company of New York, to me well known, who, being by me severally duly sworn, did each for himself depose and say, the said Frederick P. Olcott, that he is the President,

and the said Chas. H. P. Babcock, that he is the Secretary of the Central Trust Company of New York; that he knows the corporate seal of said company; that the seal affixed to the foregoing instrument is such corporate seal; that it was so affixed by order of the Board of Directors of said company, and that he signed his name thereto as such officer by like order of said board; and they severally acknowledged to me that the same was done as the act and deed of the said company. 409 410

Witness my hand and official seal the day and year above written.

[Seal.] HERBERT M. HYDE,
Notary Public,
New York City and Co.

411

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK. } ss.

I, Edward F. Reilly, Clerk of the City and County of New York, and also Clerk of the Supreme Court for the said city and county, the same being a Court of Record, do hereby certify that Herbert M. Hyde, whose name is subscribed to the certificate of the proof or acknowledgment of the annexed instrument, was, at the time of taking such proof or acknowledgment, a notary public, in and for the City and County of New York, dwelling in the said city, commissioned and sworn, and duly authorized to take the same. And further, that I am well acquainted with the handwriting of such notary, and verily believe that the 412

413 signature to the said certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said court and county this 7th day of March, 1890.

EDWARD F. REILLY,

414 Clerk.

STATE OF PENNSYLVANIA, } ss.
COUNTY OF McKEAN. }

Recorded this 10th day of March. A. D. 1890, in the Recorder's office of said county, in Mortgage Book, Vol. 14, page 140, etc.

Given under my hand and seal of said office the date above written.

415 J. M. McELROY,
Recorder.

[Seal.] H. W. CHOATE,
Deputy.

Cattaraugus County:

Recorded on the 10th day of March, 1890, at 8 o'clock P. M., in Liber 100 of Mortgages, at page 330, and examined.

416

E. A. YATES,
Dep. Clerk.

EXHIBIT "E". 417

We, J. C. French, of Olean, New York S. A. Munday and J. M. McClure, of Bradford, Penn., appointed arbitrators under and in acordance with the terms of the tenth article of a certain mortgage or deed of trust, bearing date February 1, 1890, between The Allegheny and Kinzua Railroad Company and Spencer S. Bullis and Sarah E. Bullis, his wife, parties of the first part, and the Central Trust Company of New 418
York, party of the second part, to determine the value of a portion of the property covered by said mortgage, which portion is described as follows: "All that tract or parcel of land situate in the Town of Red House, County of Cattaraugus and the State of New York, and known as Township one (1), Range seven (7) of the Holland Company's Survey, the following lots: Nos. 41, 42, 43, 34, 35, 25, 27, 33, 18, south one-half of 26, containing three thousand 419
one hundred and twelve and five-elevenths acres, more or less, in pursuance of said appointment, on Monday, June 15th, 1891, went upon and viewed said lands, and fixed the value thereof at one dollar per acre, or the value of the whole of said tract or parcel at three thousand and one hundred and twelve and 45-100 dollars, which amount we fix and determine as the sum to be paid by said first parties to said sec- 420
ond party for the release of the above described tract or parcel of land from the lien and operation of said mortgage.

Respectfully submitted,

S. A. MUNDAY,
J. C. FRENCH,
J. M. McCLURE,
Arbitrators.

421 EXHIBIT "F".

We, J. C. French, of Olean, N. Y., S. A. Munday and J. M. McClure, of Bradford, Penn., appointed arbitrators under and in accordance with the tenth article of a certain mortgage or deed of trust, bearing date February 1, 1890, between The Allegheny and Kinzua Railroad Company and Spencer S. Bullis and Sarah E. Bullis, his wife, parties of the first part,
422 and the Central Trust Company of New York, party of the second part, to determine the value of a portion of the property covered by said mortgage, which portion is described as follows: "All that certain piece or tract of land, situate in the Township of Foster, County of McKean, and State of Pennsylvania, distinguished as being a part of warrants Nos. 4335 and 4336, and bounded and described as follows: Beginning at a point in the south bounds of
423 warrant No. 4336, at the distance of nineteen (19) chains east from the southwest corner thereof, said point being the southeast corner of land owned by the City of Bradford; thence east along the south bounds of said warrant fifty-three (53) chains and sixty-two (62) links to the southwest corner of lands owned by T. W. Shore; thence north along the west bounds of said Shore lands twenty-five (25) chains to
424 the northwest corner thereof; thence east along the north bounds of said Shore land and land owned by J. C. Montague forty (40) chains to lands owned by Augustus Snyder; thence north in a line parallel to the east bounds of said warrant fifty-eight (58) chains; thence north forty-four degrees west fifty-six (56) chains; thence north in a line parallel to the east bounds of warrant No. 4335 the distance of

thirty-four (34) chains to the northern bounds thereof (said bounds being the boundary line between the States of New York and Pennsylvania); thence west along said bounds sixty-five (65) chains and ninety (90) links to the northeast corner of the aforesaid lands of the City of Bradford; thence south four degrees forty-five minutes east one hundred and sixty-one (161) chains along said company's easterly bounds to the place of beginning. Containing one thousand two hundred and sixty-seven and three-fourths (1267¾) acres." In pursuance of said appointment on Monday, June 15, 1891, went upon and viewed said lands and fixed the value thereof at one dollar per acre, or the value of the whole of said tract or parcel at one thousand two hundred and sixty-seven and three-fourths (1,267.75) dollars, which amount we fix and determine as the sum to be paid by the said first parties to said second party for the release of the above described tract or parcel of land from the lien and operation of said mortgage.

425 426 427

Respectfully submitted,

S. A. MUNDAY,
J. C. FRENCH,
J. M. McCLURE,
Arbitrators. 428

429 SUPREME COURT, CITY AND COUNTY OF NEW YORK.

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of THE ALLEGHENY AND KINZUA RAILROAD COMPANY,
Plaintiff,

Against

430 SPENCER S. BULLIS, MILLS W. BARSE, THE ALLEGHENY AND KINZUA RAILROAD COMPANY and CENTRAL TRUST COMPANY OF NEW YORK,
Defendants.

The above-named Spencer S. Bullis, Mills W. Barse and The Allegheny and Kinzua Railroad Company, for an answer to the complaint of the plaintiff herein, specifically denies the following allegations
431 contained in said complaint, to wit:

First. Said defendants deny that they have any knowledge or information sufficient to form a belief as to whether the said plaintiff is the owner and holder of ten of the first mortgage bonds of The Allegheny and Kinzua Railroad Company, as alleged in the first paragraph of said complaint, and they therefore deny the same.

432

Second. The defendants specifically deny that the said Bullis and Barse falsely and fraudulently pretended and represented to the firm of I. B. Newcombe & Company that thirty thousand (30,000) acres of timber land was free and clear from all incumbrances, or that said land was covered by a large quantity of merchantable timber, which would be

sufficient to, and would actually, provide said railroad company with at least seventy (70) tons of freight for conveyance over said railroad at rates from twenty-five cents to fifty cents per ton, in addition to the percentages accruing said defendant railroad company from divisions with other lines. 433

Third. Defendants deny that said railroad company has duly ratified, assumed and agreed to fully carry out and perform each and every of the covenants, promises and agreements referred to at fol. 14 of said complaint, except as stated in said agreements. 434

Fourth. Defendants deny that said Bullis and Barse agreed to place under the lien of said mortgage or deed of trust to be executed by the defendant railroad company 1,000 acres of timber land for each mile of railroad constructed and completed contiguous or tributary to said merged and consolidated railroad, its branches or extensions, or that they or either of them did falsely and fraudulently pretend and represent to said firm of I. B. Newcombe & Company that said lands were free and clear from all encumbrances, or that all of said land was contiguous or adjacent to the line of said railroad as the same was then constructed or surveyed and projected, and that said land was covered by a large quantity of merchantable timber capable of yielding and producing seventy tons of freight in timber, lumber and bark for each acre of land for transportation over said railroad, as alleged in subdivision five of said complaint. 435 436

Fifth. Defendants further deny that the lands conveyed, as alleged in paragraph six of said com-

437 plaint, were falsely and fraudulently represented by said defendants Bullis and Barse to be free of prior encumbrances and covered by large quantities of merchantable timber as aforesaid.

Sixth. Defendants further deny that it was a condition precedent to the issuing of $300,000 bonds, and the completion of the first forty-six miles of railroad, that the defendants Bullis and Barse should
438 cause thirty thousand acres of timber land to be conveyed to said trustee and placed under the lien of said mortgage.

Seventh. Defendants, further denying said complaint, allege that they have no knowledge or information sufficient to form a belief as to the allegations set forth in the eighth paragraph of said complaint, and they therefore deny the same.

439

Eighth. Defendants further deny that the proceeds of all the said $300,000 have been expended in the construction of said extension of said railroad, and the payment of prior liens and encumbrances upon the property of said several constituent railroad companies, or that said defendant railroad company is entirely without funds for the completion of said extension.

440

Ninth. Defendants deny that the lands conveyed by the mortgage referred to in the tenth paragraph of said complaint was encumbered by prior liens to the amount of $159,000 or the amount of $144,776.07, or that said conveyance of timber land was false and fraudulent in that a large portion of said land was not timber land, but was waste land from

which all merchantable timber had been removed, or 441
that said lands were not contiguous or adjcaent to the proposed line of railroad, or was not owned by them or either of them, as said Bullis and Barse well knew at the time they made or caused to be made the said pretended conveyance or when they enterd into said several agreements, or that by the fraud and failure of the defendants, Bullis and Barse, and the failure of the title of a portion of said lands, 442
a great fraud has been committed by them upon the holders of the bonds, which irreparably injures the said railroad company in its credit, and does irreparable damage and injury to its bondholders and stockholders, or that the defendant railroad company is powerless to perform its agreement, as alleged in said complaint.

Tenth. Defendants further deny that, owing to 443
the failure of the defendants, Bullis and Barse, to comply with the provisions of said several agreements annexed to said complaint, said railroad has been greatly damaged, as alleged in the eleventh paragraph of said complaint.

Eleventh. Defendants further deny each and every allegation set forth in the second eleventh paragraph of said complaint . 444

Twelfth. Defendants further deny each and every allegation set forth in the twelfth, thirteenth and fourteenth paragraphs of said complaint.

Thirteenth. Defendants further deny that they have continued to do and commit unlawful acts and

445 things complained of, as alleged at folio 49 of said complaint.

Fourteenth. Defendants further deny the allegations contained in the sixteenth paragraph of said complaint, down to and including the words "premises" in folio 54, or that the lands referred to at folio 59 of said complaint are substantially in the same condition and of the same value as when they were
446 placed under the lien of said mortgage, and have not deteriorated in value ,or that if they were timber lands they would be worth $25.00 per acre, or that said Barse and Bullis have been guilty of a fraud upon said defendant railroad company, its bondholders and stockholders, as alleged at folio 60 of said complaint, or that at the time of said conveyance the said lands were not timber lands, or that the fair intent and
447 meaning of said mortgage was that none of said timber lands should be released until the full amount of thirty thousand acres should be placed under the lien of said mortgage, or that said defendants have not complied with the terms of their contracts.

Fifteenth. Defendants, further answering, allege that they have no knowledge or information sufficient to form a belief as to whether the plaintiff ap-
448 plied to the Central Trust Company and requested it to take adequate action, as alleged at fol. 63, 64, 65 and 66. They therefore deny the same.

SECOND.

The above-named defendants, for a second and further answer to the said complaint, allege, upon information and belief, that they and each of them have well and truly performed all the obligations,

covenants and provisions of the several contracts re- 449
ferred to in said complaint to be by them kept and performed, except that the new or additional railroad to be constructed under the provisions of said con-

tract has not all been constructed by reason of the failure of the said I. B. Newcombe & Company and The Interior Contruction and Improvement Company to perform the several covenants and agree-
ments contained in said contracts to be kept and per- 450
formed by them, of all which the said plaintiff had knowledge at the time of the commencement of this action.

Defendants further allege that there has been no default on the part of said defendant railroad company in the payment of its bonds, or the interest thereon, or of any of the obligations contained in the
deed of trust or mortgage referred to in said com- 451
plaint, so far as the same relates to the bonds issued by said company, or any of the obligations which said company has assumed with plaintiff or any of its bondholders.

And the defendants further allege, upon information and belief, that the said plaintiff has commenced this action in collusion with said I. B. Newcombe &
Company and The Interior Construction and Im- 452
provement Company for the purpose of aiding them in avoiding their obligations to said railroad company, and obtaining control thereof to the injury and detriment of the same, and under an agreement that he should be indemnified and saved harmless from the costs and expenses of the action, and not for the

453 bona fide purpose of protecting himself or the other bondholders of said company, but rather for the purpose of so complicating and embarrassing the affairs of said railroad company so as to prevent it from performing its obligations to its bondholders.

Wherefore, said defendants ask that said complaint be dismissed with costs.

455 FRANK RUMSEY,
Defendants' Attorney,
84 Exchange Street, Buffalo, N. Y.

State of New York, }
Cattaraugus County, } ss.

Spencer S. Bullis, being duly sworn, says that he is one of the defendants in the above-entitled action; that he knows the contents of the foregoing answer,
445 and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SPENCER S. BULLIS.

Sworn to before me, this 16th
day of December, 1891.

456 ALLEN J. HASTINGS,
Notary Public.

SUPREME COURT, CITY AND COUNTY OF NEW YORK. 457

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of THE ALLEGHENY AND KINZUA RAILROAD COMPANY,
Plaintiff.

Against

SPENCER S. BULLIS, MILLS W. BARSE, THE ALLEGHENY AND KINZUA RAILROAD COMPANY and CENTRAL TRUST COMPANY OF NEW YORK,
Defendants. 458

The defendant, Central Trust Company of New York, by Butler, Stillman & Hubbard, its attorneys, for answer to the complaint of the plaintiff herein, respectfully shows to the court and alleges as follows: 459

I. It admits the truth of the allegations contained in the first paragraph of the complaint, and further

alleges that it is a corporation duly organized and exising under and by virtue of the laws of the State of New York, and is trustee of the mortgage in said complaint mentioned. 460

II. It admits, upon information and belief, the truth of the allegations contained in the second paragraph of the complaint.

III. It admits, upon information and belief, the truth of the allegations contained in the third paragraph of the complaint.

461 IV. It admits, upon information and belief, the truth of the allegations contained in the fourth paragraph of the complaint.

V. It admits, upon information and belief, the truth of the allegations contained in the fifth paragraph of the complaint.

VI. It admits the execution of the mortgage men-
462 tioned in the sixth paragraph of the complaint herein, and further admits, upon information and belief, the remaining allegations in said paragraph contained.

VII. It admits the truth of the allegations contained in the seventh paragraph of the complaint.

VIII. It admits, upon information and belief, the truth of the allegations contained in the eighth para-
463 graph of the complaint.

IX. Answering the allegations contained in the ninth paragraph of the complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph contained.

X. This defendant admits, upon information and
464 belief, the truth of the allegations contained in the tenth paragraph of the complaint.

XI. Answering the allegations contained in the eleventh, twelfth, thirteenth, fourteenth and fifteenth paragraphs of the complaint, this defendant alleges that it has no knowledge or information sufficient to form a belief as to the truth of the allegations contained in said eleventh, twelfth, thirteenth, fourteenth and fifteenth paragraphs of the complaint.

XII. Answering the allegations contained in the sixteenth paragraph of the complaint, this defendant admits that the mortgage therein mentioned contains a provision authorizing the release of property from said mortgage substantially as alleged in the said complaint, and that in accordance with the provisions of said mortgage, the persons mentioned in said sixteenth paragraph of said complaint were appointed arbitrators under and for the purposes set forth in the tenth article of said mortgage or deed of trust, and that said arbitrators made their awards or certificates in writing, copies of which are annexed to said complaint as Exhibits "E," and "F," and that the statements contained in said sixteenth paragraph of said complaint with respect to the contents of said certificates are substantially correct. It further admits that prior to the commencement of this action the plaintiff made application to this defendant to take action substantially as is alleged in said sixteenth paragraph of said complaint, and it alleges that at the time it was so requested by the plaintiff to take action, it did not have, nor was it able to obtain, sufficient information to warrant or authorize it to refuse to execute the release or releases mentioned in the said sixteenth paragraph of said complaint, or to take such action against said Bullis and Barse as was requested by the plaintiff. It alleges that it has no knowledge or information sufficient to form a belief as to the truth of the other allegations contained in said sixteenth paragraph of said complaint.

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469 Wherefore, this defendant submits itself to the judgment of the court in the premises, and prays that such final decree or judgment may be rendered as will protect and enforce the rights of this defendant, and for such other or further relief as to the court shall seem just.

BUTLER, STILLMAN & HUBBARD,
Attorneys for Defendant,
470 Central Trust Company of New York,
54 Wall Street,
New York, N. Y.

State of New York,
City and County of New York,

E. Francis Hyde, being duly sworn, deposes and says that he is second vice-president of the defendant
471 Central Trust Company of New York, above named; that he has read the foregoing answer of said defendant and knows the contents thereof; that the same is true of his own knowledge, except as the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true.

E. FRANCIS HYDE.

472 Sworn to and subscribed
before me, this 26th day
March, 1892.

WM. F. JUDSON,
Notary Public,
Westchester County.

Certificate filed in N. Y. Co.

At a Special Term of the Supreme Court of the State of New York, held in and for the County of New York, in the County Court House in the City of New York, on the 6th day of April, 1895. 473

Present—Hon. George C. Barrett, Justice.

JAMES R. O'BEIRNE,
Plaintiff,
Against
SPENCER S. BULLIS, Et al
Defendants. 474

The issues of fact in this action coming on to be tried by the Court at a Special Term held by the undersigned without a jury upon the 19th day of February, 1895, and the allegations and evidence of the parties having been heard, and after hearing Hamilton Odell, Frank Sullivan Smith and C. Walter Artz, counsel for the plaintiff, and William W. Cook, Adelbert Moot and George L. Roberts, counsel for the defendants, Bullis and Barse, and due deliberation having been had thereon, I do decide and find as follows: 475

MATTERS OF FACT FOUND ON REQUEST OF PLAINTIFF.

I. That the plaintiff, at the time of the commencement of this action, was and now is the owner and holder of ten of the first mortgage bonds of the defendant, The Allegheny and Kinzua Railroad Company. 476

II. That the defendant, The Allegheny and Kinzua Railroad Company, is a corporation duly organized and existing under and by virtue of the laws of

477 the State of New York and the Commonwealth of Pennsylvania, and ever since such organization up to the commencement of this action was engaged in the maintenance and operation of a line of railroad within the County of Cattaraugus in the State of New York and the County of McKean in the Commonwealth of Pennsylvania.

478 III. That since the commencement of this action, to wit, on or about the first day of October, 1892, said defendant railroad company has passed into the control and management of a Receiver appointed by the Supreme Court, and said Receiver is now operating said line of railroad.

IV. That until the appointment of such Receiver the defendants, Bullis and Barse, through the owner-
479 ship of a majority of the capital stock of the defendant railroad company, owned and controlled the same, and were in the active management of the operations thereof.

V. That said railroad company is insolvent.

VI. That said defendant, The Allegheny and Kinzua Railroad Co., is a consolidated corporation
480 formed by the merger and consolidation of the Allegheny and Kinzua Railroad Co., a corporation of the State of New York, and the Bradford and Corydon Railroad Co., a corporation of the Commonwealth of Pennsylvania.

VII. That said merger and consolidation was effected in accordance with law on the 26th day of February, 1890.

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VIII. That said Bradford and Corydon Railroad Co., for convenience styled "the first Bradford and Corydon Railroad Company," previous to said consolidation, was a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, and formed by the merger and consolidation under said laws of the Bradford and Corydon Railroad Co. and the Allegany and Kinzua Railroad Co., both corporations 482
organized and existing under the laws of said Commonwealth.

IX. That said defendant railroad company has a capital stock of $500,000, divided into 5,000 shares of $100 each, par value.

X. That the merger and consolidation of said constituent companies and the extension of the railroad 483
of the defendant railroad company, was part of a single scheme or plan for the construction and consolidation of the lines owned or projected by said defendant, by and between defendants Spencer S. Bullis and Mills W. Barse upon the one hand, and the firm of I. B. Newcombe & Co., Bankers, of the City of New York, on the other.

XI. That on the eighth day of October, 1889, the 484
defendants Bullis and Barse and said I. B. Newcombe & Co. duly executed an agreement in writing, providing as therein stated for the consolidation and extension of the railroad and properties of the first Bradford and Corydon Railroad Company and the Allegheny and Kinzua Railroad Company, corporations existing under the laws of the Commonwealth of Pennsylvania, a copy of which said agreement is annexed to the complaint herein as Schedule "A."

485 XII. That at the time of the execution of said contract, Schedule "A," the corporations referred to therein owned and operated an aggregate of sixteen miles of railroad, all located in the County of McKean, in the Commonwealth of Pennsylvania.

XIII. That at the date of said agreement, and until after the execution of the mortgage of the defendant railroad company, as hereinafter stated, the
486 property of the several companies composing the defendant railroad company was encumbered by at least $125,000 of liens prior to that of the mortgage of the defendant railroad company.

XIV. That the costs of constructing said first Bradford and Corydon Railroad Company, said Allegany and Kinzua Railroad Company of Pennsylvania, and said Allegheny and Kinzua Railroad Com-
487 pany of New York, was in all $252,500.

XV. That no work of construction was done under said contract of October 8, 1889.

XVI. That on the ninth day of December, 1889, said firm of I. B. Newcombe & Co., of the one part, and said Bullis and Barse of the other, duly made and executed a certain other contract in writing, bearing
488 date on said day, copy whereof is annexed to the complaint herein as Exhibit "A."

XVII. That on the said ninth day of December, 1889, under and in accordance with the terms of said contract, Exhibit "A" to the complaint herein, the Allegheny and Kinzua Railroad Company of New York, of the one part, and The Interior Construction and Improvement Company of the other part, duly

made and executed a certain contract in writing, 489
dated on said day, copy whereof is annexed to the complaint herein, and marked Exhibit "B."

XVIII. That upon said ninth day of December, 1889, under and in conformity to the terms of said contract, Exhibit "A" to the complaint, and said contract, Exhibit "B" thereto, The Interior Construction and Improvement Company of the one part, and said defendants Bullis and Barse of the other part, 490
made and executed a certain contract in writing, dated on the said day, copy whereof is annexed to the complaint herein, marked Exhibit "C."

XIX. That the defendants Bullis and Barse were, at the time of the execution of said contracts of October 8th, 1889, and December 9th, 1889, annexed to the complaint and marked Schedule "A," and Exhibits "A," "B" and "C," respectively, the owners 491
and holders of all of the capital stock of the several constituent railroad companies thereafter consolidated to form the defendant railroad company, to wit: the Bradford and Corydon Railroad Company, the Allegheny and Kinzua Railroad Company of the Commonwealth of Pennsylvania, and the Allegheny and Kinzua Railroad Company of the State of New York.

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XX. That before the execution of the contract, Schedule "A," to wit, during the late spring or early summer of 1889, the defendants, Bullis and Barse, sought assistance from Newcombe & Company to consolidate and extend their said railroads, located in the Commonwealth of Pennsylvania.

XXa. That at said time, to wit, in the late spring

493 or early summer of 1889, said Bullis and Barse offered as security for moneys obtained or advanced by reason of such assistance on the part of Newcombe & Company, a mortgage or deed of trust covering all the property of said two Pennsylvania corporations.

XXb. That thereafter and about the month of
494 September, 1889, said properties were examined by John Bryne, engineer of the house of I. B. Newcombe & Company, and thereupon said offer in its then shape was declined by said firm, upon the ground of inadequacy of security, and said firm insisted that in order to procure their acceptance of the same the mortgage should constitute a lien upon a sufficient amount of lands as the principal security, said lands to be well timbered with hemlock and oth-
495 er valuable timber, and located contiguous and tributary to said railroads and the proposed extensions of the same.

XXc. That the defendants, Bullis & Barse, assented to the said demand of Newcombe & Company.

XXI. That the defendant, The Allegheny and
496 Kinzua Railroad Company, on the 27th day of February, 1890, by Spencer S. Bullis, its president, duly made and executed a certain mortgage or deed of trust, dated February 1, 1890, which said instrument was also signed by Spencer S. Bullis, individually, and Sarah E. Bullis, his wife, upon said 27th day of February, 1890.

XXII. That said mortgage, as so executed, cor-

497 responds with the copy mortgage, Exhibit "D" to the complaint herein, except the following insertion: After the word "conveyance" in the sixth line on the tenth page, the following: "until default shall have been made by said railroad company in the performance of all and singular the covenants and agreements of this indenture and of the bonds and coupons herein mentioned." At the end of the fifteenth line, on the tenth page of said mortgage, the follow- 498 ing: "Provided, however, that the foregoing exceptions and reservations shall cease and determine whenever said railroad company shall make such default, whereupon all right, title, property, license, easement or privilege of the said Spencer S. Bullis, his heirs, executors, administrators or assigns, in and to, or upon all and singular said lands and premises, by reason of said exception and reservation, 499. shall cease and determine, anything to the contrary herein contained notwithstanding, and the same shall at once vest absolutely in the said trustee, the party of the second part hereto., its successor or successors, as fully as if none of said exceptions and reservations had ever been made, and the said trustee shall thereupon have and possess full power and authority to avail itself of, and shall be entitled to receive all the benefits and profits of any and all contracts or 500 agreements which may have been at any time theretofore made by the said Spencer S. Bullis, his heirs, executors, administrators or assigns, under or by virtue of any of said exceptions or reservations, or in any way relating to any lumber, timber, wood, bark, or other product of the forest, or any coal, iron, oil, petroleum, or other mineral upon, in, or under said lands and premises hereby conveyed, as fully as

501 if the same had been made for the sole benefit of the party of the second part, its successor or successors, as trustees for the holders of said bonds and coupons." Also, on page thirteen of said mortgage, at the fifteenth line of Article IV, after the word "railroad," the following: "and lands and premises."

XXIII. That said mortgage was not signed by the trustee until after said insertions had been made
502 in the same, to wit, on the 7th day of March, 1890.

XXIV. That after said 27th day of February, 1890, and before the 4th day of March, 1890, said mortgage, as excuted by said railroad company and said defendant Bullis and wife, was, with the knowledge of said Bullis and Barse, submitted to the firm of Woodbury & Moulton, Bankers, of Portland, Maine.

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XXV. That, with the knowledge of said Bullis and Barse, said Woodbury & Moulton were interested with said firm of I. B. Newcombe & Company in the promotion of the scheme of extension and consolidation of the properties composing the defendant railroad company, in that they were the intended purchasers and subsequently the actual purchasers of $125,000 at par of the first mortgage
504 bonds of said railroad company.

XXVI. That on the 4th day of March, 1890, the defendants, Bullis and Barse, Edward H. York, a member of the firm of Woodbury & Moulton, and John Byrne, engineer for the firm of I. B. Newcombe & Company, met in the office of Frank Sullivan

Smith, No. 48 Wall Street, New York City, Lewis F. 505
Wilson, said Frank Sullivan Smith's managing clerk, being also present.

XXVII. That upon said meeting said York insisted that the absolute reservation to the defendant Bullis of said timber, bark, etc., contained in said mortgage, should be modified by a provision that said reservation should cease and determine on default and the benefit thereof inure to the bondhold- 506
ers or their trustee.

XXVIII. That said Bullis and Barse acquiesced in said request of said York.

XXIX. That thereupon said Wilson, under the instruction of the parties present, drafted the following proviso, to be inserted after the reservation in the mortgage: "Provided, however, that in case of default in the payment of the principal or interest upon 507
any of said bonds when the same shall become due, all of said reservations to said Bullis shall cease and determine, and said trustee shall have the right to sell said timber lands free of any reservations but subject to such contracts or leases as shall have been theretofore made, and the moneys due or to become due under such contracts or leases shall from thenceforth be paid to the purchasers upon such sales by the said trustee." 508

XXX. That said Bullis, York, Barse and Byrne then agreed that although said clause expressed the views of all, said Bullis had best go to Olean, New York, where said Frank Sullivan Smith then was, and have him draft a provision embodying those views.

509 XXXI. That thereupon said Bullis went to Olean and upon the 5th day of March, 1890, representing all parties to said conference, requested said Smith to draft the provision referred to in the last finding.

XXXII. That said Smith thereupon wrote out in long hand the insertion or amendment referred to in the twenty-first finding herein and delivered the same to the defendant Bullis.

510 XXXIII. That the defendant Bullis caused the same to be typewritten in triplicate, retaining one copy for himself, sending one copy to Woodbury & Moulton at Portland, Maine, and sending the third copy to Lewis F. Wilson.

XXXIV. That said Bullis directed said Wilson, by letter, to change said mortgage by making said insertions.

511 XXXV. That said Wilson, in conformity to said request, did cause said insertions to be made in the said mortgage, which had already been printed, by reprinting several of the pages thereof.

XXXVI. That, at the request of the defendant Bullis, said mortgage was never re-executed by said railroad company, or said Bullis and wife, individ-

512 ually.

XXXVII. That in making said request, said Bullis acted for himself and the defendant Barse, and said railroad company.

XXXVIII. That subsequent to said amendment to or insertion in said mortgage, to wit, on March 10, 1890, the same was executed by the Central Trust Company of New York, Trustee.

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XXXIX. That said mortgage was thereupon sent to the defendant Bullis, to be recorded by him.

XL. That said defendant Bullis did cause said mortgage, in the shape in which it finally stood, that is, in the same shape as annexed by copy to the complaint herein, to be recorded in the County of Cattaraugus, in the State of New York, and the County McKean, in the Commonwealth of Pennsylvania. 514

XLI. That at all times since the organization of the defendant railroad company by the consolidation of the Bradford and Corydon Railroad Company and the Allegheny and Kinzua Railroad Company of New York, on February 26, 1890, the defendant Bullis was, and still is, the President of the defendant railroad company.

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XLII. That said mortgage was made in effectuation of, and as part performance of the agreements of December 9, 1889, on the part of the defendants, Bullis and Barse.

XLIII. That said defendants, Bullis and Barse, acquiesced in and consented to the change in said mortgage above referred to, and the recording of the same as so changed, without re-execution by said railroad company, or said Bullis and wife, individually. 516

XLIV. That in and by said contract, Exhibit "A" to the complaint herein, $300,000 at par value of the bonds secured by said mortgage, Exhibit "D," were to be put upon the market at once.

XLV. That in and by said contract, Exhibit "A," it was provided that said $300,000, at par value of

5.7 said bonds, should represent 46 miles of railroad constructed and completed, being the 30 miles of railroad mentioned in said Schedule "A," and the 16 miles of railroad of said Allegheny and Kinzua Railroad Company of New York.

XLVI. That in and by said contract, Exhibit "B," The Interior Construction and Improvement Company undertook to provide for the construction
518 of the first 46 miles of road, which were represented by said $300,000 of bonds, and also to increase the mileage of the defendant railroad company to 70 miles, the balance of which should be represented by the $200,000 of said bonds which were to be reserved for that purpose.

XLVII. That under and by the provisions of the contract, Exhibit "C," between said construction
519 company and the defendants, Bullis and Barse, said defendants undertook to provide for the construction of the mileage undertaken to be constructed by said construction company, and under said contract, Exhibit "C," to do all things which said construction company had undertaken to do in connection with said construction.

XLVIII. That under and by terms of said con-
520 tracts, Exhibits "A," "B" and "C," said defendants, Bullis and Barse, were to provide for and do all the work on construction contemplated in the scheme of consolidation and extension referred to in said contracts, Exhibits "A," "B" and "C," and mortgage, Exhibit "D."

XLIX. That it was understood by all the parties to said contracts that the construction and exten-

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sion of the lines of the defendant railroad company to a mileage of 46 miles, was to be accomplished by means of the proceeds of said $300,000 of bonds.

L. That the remaining $200,000 at par of said bonds was deposited with the defendant trust company, in whose custody they now remain.

LI. That the said $300,000, at par value of said bonds, were duly issued by said trust company, and are now outstanding, except the sum of $15,000 thereof, which were redeemed under the sinking fund provisions contained in the mortgage, on the first day of February, 1891.

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LII. The default was made in the payment of the coupons upon the outstanding bonds of said defendant railroad company, being $285,000 on the first day of February, 1892.

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LIII. That default was made at that time also upon the redemption of $15,000 of said $285,000 of bonds outstanding, under and in accordance with the sinking fund provisions contained in said mortgage.

LIV. That said defendants Bullis and Barse covenanted and agreed with said firm of I. B. Newcombe & Co. that the said $300,000 of bonds should be secured at the time of their issue by all the rights, franchises and property of said defendant railroad company, and also by 30,000 acres of timber lands contiguous or tributary to one or other of the lines of the constituent companies, which said lands should be timbered and profitable to said defendant railroad company, and which said Bullis and Barse alleged and represented were owned or controlled by them.

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525 LV. That said defendants Bullis and Barse covenanted and agreed with said firm of I. B. Newcombe & Co., that said $200,000 of bonds deposited with said Central Trust Company as aforesaid, should be sold and their proceeds used for the purpose of constructing and extending the lines of the defendant railroad company, from a mileage of 46 miles to a total mileage of 70 miles of railroad, which said $200,-
526 000 of bonds should be secured by an additional grant of 16,000 acres of timber land, which said lands should be contiguous or tributary to one or other of the several constituent lines or their extensions, and timbered and profitable to the defendant railroad company and which said lands the defendants Bullis and Barse alleged and represented were owned or controlled by them.

527 LVI. That said grant of 30,000 acres of land to secure said $300,000 of bonds heretofore issued was to be made by defendants Bullis and Barse, or on their behalf, by a first mortgage to the defendant Central Trust Company.

LVII. That said grant of 16,000 acres of land additional to the 30,000 acres heretofore referred to, to secure the additional $200,000 of bonds above men-
528 tioned, was to be made by the said defendants Bullis and Barse, or on their behalf, by a first mortgage to the defendant Central Trust Company.

LVIII. That said mortgage, Exhibit "D," was executed by said Spencer S. Bullis and wife in apparent and partial performance of the undertakings and contracts in said agreements, Schedule "A," and Exhibits "A," "B" and "C," and said scheme of consolidation and extension hereinbefore mentioned.

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LIX. That said $300,000 of bonds so issued as aforesaid by the defendant railroad company were disposed of by the firm of I. B. Newcombe & Co. as follows: $40,000 thereof was retained by said I. B. Newcombe & Co. to provide for the commission mentioned in said contract, Exhibit "A," and the remainder, being $260,000 thereof, were duly sold by said firm of I. B. Newcombe & Co. to the plaintiff and his co-bondholders in good faith.

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LX. That said bonds were so retained and sold by said firm of I. B. Newcombe & Co., with full knowledge of and reliance upon the said several agreements, Schedule "A," and Exhibits "A," "B" and "C," and particularly upon the provisions contained therein by the conveyance to the defendant trust company of 30,000 acres of timbered land as a further security for said bonds, of the character described in said agreement, and of the kind and value stated and described by said defendants Bullis and Barse.

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LXI. That at and before the making and execution and delivery of said several agreements, the defendants Bullis and Barse pretended and represented to the said firm of I. B. Newcombe & Co. that the said 30,000 acres of land were timbered, free and clear of all encumbrances, and contiguous and adjacent to the line of the defendant railroad company, as the same was then constructed and projected, and that said land was covered by a large quantity of merchantable timber, which would be sufficient to and would actually provide said railroad with at least 70 tons of freight to the acre, for conveyance over said railroad at rates from 25 to 50 cents per ton, in

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533 addition to the percentage accruing to said defendant railroad company from divisions with other lines.

LXII. That said scheme for consolidation and extension, referred to in said Exhibits "A," "B" and "C" and "D," and the placing of timber land under the mortgage of the defendant railroad company, was presented to the firm of Woodbury & Moulton, Bankers, of Portland, Maine.

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LXIII. That the request of said Bullis and Barse, said firms of I. B. Newcombe & Co. and Woodbury & Moulton caused their respective engineers, John Byrne and William B. Parsons, to visit said proposed timber land on or about November, 1889.

LXIV. That said Byrne and Parsons were es-
535 corted through certain timber lands in said County of McKean, in the Commonwealth of Pennsylvania, and the town of Red House, in the County of Cattaraugus, and State of New York, by the defendant Bullis, by and with the request and knowledge of the defendant Barse.

LXV. That said lands through which said Byrne and Parsons were escorted by said Bullis were heav-
536 ily timbered, the timber standing upon them being chiefly hemlock.

LXVI. That said Bullis pointed out and exhibited to said Byrne and Parsons said timber land through which he escorted them, and stated that said lands were to be placed under said mortgage, Exhibit "D."

LXVII. That said Byrne and Parsons thereupon reported to their respective firms the condition of

said lands, based upon the statements of said Bullis and Barse, and the statements of said Bullis at the time of said visit by said Byrne and Parsons. 537

LXVIIa. That before said trip of said Byrne and Parsons, and both before and after the execution of said contract of October 8th, 1889, Schedule "A," the defendants Bullis and Barse had stated and represented to Newcombe & Company that the mortgage to be placed upon the consolidated properties would be a first lien upon the land included within it, and said land was in fact well timbered with hemlock and other valuable timber, and situate contiguous and tributary to said lines of railroad and the proposed extensions thereof. 538

LXVIII. That upon the report of said Byrne, based upon the statements of said Bullis and the exhibition by him of said lands to said Byrne, and the statements and representations thertofore made by the defendants Bullis and Barse, the said firm of I. B. Newcombe & Company embarked in the enterprise, and entered into said scheme of consolidation and extension. 539

LXIX. That upon the report of said Parsons, based likewise upon the statements and representations of said Bullis and Barse and the exhibition of said lands to said Parsons by said Bullis, the said firm of Woodbury & Moulton embarked in the enterprise, and entered into said scheme of consolidation and extension. 540

LXX. That said lands contracted to be placed under said mortgage by said Bullis and Barse were defined upon the ground by said Bullis acting for said

541 Bullis and Barse, and by him, in or about the month of November, 1889, pointed out to John Byrne, acting for and as engineer of said firm of I. B. Newcombe & Co., and William B. Parsons, acting in a similar capacity for the firm of Woodbury & Moulton, Bankers, of Portland, Maine.

LXXI. That the lands so defined by said Bullis
542 and Barse as the subject matter, in that respect, of their contracts and agreements aforesaid, were heavily timbered with hemlock and other valuable timber, and adjacent and contiguous to the lines of the defendant railroad company as then constructed and projected.

LXXII. That said lands so defined and pointed out were worth from eighteen to twenty dollars an
543 acre.

LXXIII. That said lands so defined lay in the valleys of Kinzua Creek, Sugar Run and Willow Creek, in the Townships of Bradford, Corydon, Hamilton and Foster, in the County of McKean and State of Pennsylvania, and in the Town of Red House, in the County of Cattaraugus and State of New York.

544 LXXIV. That upon the faith of said representations of the defendants, Bullis and Barse, the said firm of I. B. Newcombe & Company undertook said scheme and entered into said contracts, Exhibits "A," "B" and "C," and sold and disposed of said $260,000 of bonds as aforesaid thereunder, and said firm of Woodbury & Moulton, likewise relying thereon, purchased at par value $125,000 of said bonds from said firm of I. B. Newcombe & Company.

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LXXV. That the proceeds of said $260,000 of bonds were turned over by said Newcombe & Company and duly and fully applied to the extinguishment of liens and the construction of the defendant railroad company's lines to a mileage of forty-six miles of main line and branches.

LXXVI. That $125,000, the proceeds of the sale at par of $125,000 of said bonds, was paid over to the 546
defendants, Bullis and Barse, for the purpose of extinguishing liens and encumbrances existing upon the properties and assets of the various constituent companies theretofore consolidated to form the defendant railroad company.

LXXVII. That the said The Interior Construction and Improvement Company, as a corporation party to said contracts, Exhibits "B" and "C," is, and 547
at all times in the complaint mentioned was, a corporation duly organized and existing under and by virtue of the laws of the State of New Jersey.

LXXVIII. That said The Interior Construction and Improvement Company was intended, under said contracts, to subserve merely the position of agent for the defendants, Bullis & Barse, and for the consideration in said contract, Exhibit "B" express- 548
ed, to loan to said Bullis and Barse the use of its name in connection with said construction therein agreed to be made by them.

LXXIX. That under said contracts, Exhibits "A," "B" and "C," the defendants, Bullis and Barse, undertook to carry on the work of construction.

LXXX. That on or about the month of August,

549 1890, said Bullis and Barse failed and refused to continue said work of construction.

LXXXI. That thereupon the credit of said defendant railroad company became threatened, as well as the credit of said construction company, whose name was used in certain of the contracts regarding said construction being done by the defendants, Bullis and Barse.

550 LXXXII. That at said time last mentioned said Bullis and Barse called upon the said The Interior Construction and Improvement Company to take up the work of construction and continue the same under said contracts annexed to the complaint, by reason of the inability of said Bullis and Barse to carry out the same.

551 LXXXIII. That said construction company thereupon intervened and took posession of and continued said work of construction.

LXXXIV. That the forty-six miles of railroad provided for in said contracts, Exhibits "A," "B" and "C," which the $300,000 of bonds above referred to represented, were completed before the commencement of this suit.

552 LXXXV. That there was constructed under said contracts two and 41-100 miles of railroad in the Kinzua Valley, beginning at a point called Morrison's.

LXXXVI. That said two and 41-100 miles of railroad was intended to be and was and is a part of the system of the defendant railroad company.

LXXXVII. That the said mortgage to the defendant Central Trust Company (Exhibit "D") was

executed by the said defendant, The Allegheny and Kinzua Railroad Company, and also by the said defendant Bullis and Sarah E. Bullis, his wife. 553

LXXXVIII. That the said mortgage (Exhibit "D") was so executed by the defendant, The Allegheny and Kinzua Railroad Company, and also by the said defendant Bullis and Sarah E. Bullis, his wife, with the knowledge and approval of the defendant Barse. 554

LXXXIX. That the said mortgage (Exhibit "D") was executed by the defendant Bullis and Sarah E. Bullis, his wife, as a pretended performance of the said covenants and agreements of said Bullis and Barse to convey 30,000 acres of timber land so that the same should be an additional security for the said $300,000 of bonds, and they thereby represented and made it apear that they had granted and conveyed to the said defendant trust company, for said purpose, various tracts and parcels of land amounting in the aggregate to about 30,954.19 acres. 555

XC. That no change was ever made in said mortgage regarding the obligations of the defendant railroad company thereunder, after the same was signed on its behalf. 556

XCI. That said mortgage, as amended as above stated, was in all respects ratified by the defendants Bullis and Barse.

XCII. That, relying upon the representations of said defendant Bullis that he was the owner of the said described tracts and parcels of land and had good

557 right to convey the same, made by his joining in the said mortgage (Exhibit "D,") and believing that said representations were true, and that by reason thereof said Bullis and Barse were in good faith performing their said covenants and agreements in that behalf, the said firm of I. B. Newcombe & Company approved and accepted the said mortgage, and in reliance thereon proceeded in all respects to carry out
558 and perform their agreements with said defendants Bullis and Barse in reference to said lands.

XCIII. That the statements and representations of said defendants Bullis and Barse with respect to said timber lands, mentioned and referred to in said Exhibits "A," "B" and "C" and Schedule "A" annexed to the complaint, were fraudulent and made with intent to deceive.

559 XCIV. That the plaintiff was in fact deceived by said statements and representations.

XCV. That said statements and representations were false and untrue.

XCVI. That said agreement was in fact fraudulently made with respect of the lands agreed to be
560 conveyed by said Bullis and Barse.

XCVII. That said mortgage, contracts and agreements provide for the execution on behalf of said Bullis and Barse of a first mortgage upon lands therein described.

XCVIII. That said pretended conveyance of mortgage of said 30,954.19 acres of land to the defendant Trust Company by the defendant Spencer S.

Bullis and Sarah E. Bullis, his wife, in and by said mortgage, was not a compliance with the terms of the said several agreements so made, executed and delivered by said defendants Bullis and Barse as aforesaid. 561

XCIX. That the defendant Bullis had not title to all of the lands and timber theron mentioned and conveyed in said mortgage at the date of the execution thereof, and has not since acquired good and sufficient title thereto. 562

C. That of the lands mentioned and described in said mortgage, Exhibit "D," 24,971.52 acres thereof, more or less, being warants 3708, 3717, 3719, 4874, 4872, 4871, 4917, 3702, 3710, 3712, 3718, 3699, 4335, 4336, 3722, 2396, 2550, 4913, 5572 5556, 3703, 3422, 3423, 4875, 4876, 3706, 3734, 3711, 5573, and lots 18 and 34, were not owned by said Bullis at the date of said mortgage and do not constitute a compliance with the covenants and agreements of said Bullis and Barse. 563

CI. That the following warrants described in the mortgage annexed to the complaint herein were not timbered, or had all timber removed off them at the date of the execution of said mortgage, to wit: Warrants 3734, 3711, 3702, 4335, 4336, 4872, 4875, 4876, 3422, 3423, 5573, 5572, 3703, 3708, 3717, 3719, 3699, 5556, all in the County of McKean, State of Pennsylvania, and lots 41, 42, 43, 34, 35, 25, 27, 33, 18 and 26, located in the Town of Red House, County of Cattaraugus, State of New York, and their conveyance was not a compliance with the contracts of said Bullis and Barse. 564

565 CII. That the folowing warrants, or portions of warrants, described in the mortgage annexed to the complaint herein, were not worth at the date of the execution of the said mortgage to exceed $1.00 an acre, to wit: 4874, 4875, 4876, 3422, 3423, 4335, 4336, 500 acres of 3699, 3702, 3717 and 5573.

CIII. That the following warrants, or portions of warrants, described in the mortgage annexed to the
566 complaint herein, were worth the following prices per acre at the date of the execution of said mortgage:

5572	$ 2.00 per acre.
700 acres, 3699	5.00 per acre.
3711	5.00 per acre.
3706	10.00 per acre.
3703	3.00 per acre.
3708	3.00 per acre.
567 3734	7.00 per acre.
Lot 41	3.00 per acre.
Lots 42 and 43	8.00 per acre.
Lots 27, 33 and 18	6.00 per acre.
Lots 25 and 26	5.00 per acre.

CIV. That the following warrants, or portions of warrants, described in the mortgage annexed to the complaint herein, were worth at the date of the exe-
568 cution of said mortgage not to exceed $1.00 per acre, viz.: Warrants 5556, 3717, 3719, 4874, 4872, 5573, 3423, 3422, 4875, 4876, 500 acres of 3699, 3702.

CV. That timber lands of the character described in the contracts and agreements annexed to the bill herein, and intended to be placed under the mortgage in accordance with the said scheme, were worth, February 1st, 1890, at least $18.00 per acre.

CVI. That in order to constitute a compliance with said contracts, copies whereof are annexed to the complaint herein, and said original scheme, timber land of the mortgage value of at least $18.00 per acre should have been placed under the lien of said mortgage. 869

CVII. That the defendant Bullis, at the date of the execution of the mortgage above mentioned, did not have the title to the soil of certain of the lands described in said mortgage and the timber standing thereon, being warrants 3708, 3717, 3719, 4874, 4872, 4871, 4917, 4335, 4336, 3710, 3712, 3718, 3699, 3702, 3722, 2396, 2550, 4913, lot 18, aggregating 15,800.92 acres more or less. 870

CVIII. That the defendant Bullis, at the date of the execution of the mortgage above mentioned, did not have free and unencumbered title to the following lands described in said mortgage, to wit: Warrants 5572, 5556, 5573, 2396, 2550, 4913, 3706, 3734, 3711, 3714, 3731, 4335, 4336, 3722, 3703, 3708, 4871, 4917, 3717, 3719, 4872, 4874, lot 34. 871

CIX. That of the lands mentioned and described in the said mortgage, Exhibit "D," 1,900 acres thereof, being warrants 3731 and 3714, were owned by said Bullis at the date of said mortgage and constitute a compliance with the covenants and agreements of the defendants, Bullis and Barse. 872

CX. That of the lands mentioned and described in said mortgage, Exhibit "D," 2,512 acres thereof more or less, being lots 41, 42, 43, 35, 25, 27, 33 and 26, were owned by the defendant Bullis, but were not timbered at the time of the execution of said mort-

573 gage and do not constitute a compliance with the covenants and agreements of the defendants, Bullis and Barse.

CXI. That the value of said lands, the soil of which was owned by the defendant Bullis, at the date of said mortgage, but which were not timbered, is $13,350.

574 CXII. That the value of said lands which were not owned by said defendant Bullis, at the date of said mortgage is $175,502.77.

CXIII. That the defendants, Bullis and Barse, owned a controlling interest in the stock of the defendant railroad company, and are now and have been in possession and control of said defendant during its entire existence hitherto.

575

CXIV. That prior to the commencement of this action the plaintiff, on behalf of himself and all bondholders similarly situated, duly applied to the defendant Central Trust Company of New York, and requested it, for the protection of said bondholders, to take adequate action in the premises and institute this suit, but that said Trust Company refused to accede to such demand and request, and neglected and
576 refused to bring this or any other suit for the protection of the rights of the bondholders.

MATTERS OF FACT FOUND ON REQUEST OF DEFENDANTS, BULLIS AND BARSE.

CXV. That the plaintiff O'Beirne drew a check for $12,480.22 upon the United States National Bank in alleged payment of said bonds.

CXVI. That the plaintiff O'Beirne has not given anybody any check for said bonds, or any check on account of said bonds, excepting the said check on the United States National Bank. 577

CXVII. That the defendant Bullis, prior to the execution of the contracts, took Mr. Byrne over warrants numbered 3414, 4909, 3705, 3732, 3721, 3722, 3710, 3712, 4876, 3422, 4876, 3423, 3424, and showed Bryne the character of the timber thereon. 578

CXVIII. That the $125,000 realized from the sale of bonds to Woodbury & Moulton were used to pay prior mortgages on and debts of the three original small railroad companies.

CXIX. That after the incomplete construction of the railroad by The Interior Construction and Improvement Company ceased, the construction company prevented by an armed force and by injunction any one completing the uncompleted railroad. 579

CXX. That the defendants, Bullis and Barse, guaranteed for two years six per cent. dividends on $40,000 of the stock of said railroad company.

CXXI. That the defendant Bullis considered himself worth $150,000 at the time or guaranteeing said stock, but that since that time judgments against him have been obtained and execution thereon returned unsatisfied. 580

CXXII. That I. B. Newcombe & Co., John Byrne, The Interior Construction and Improvement Company and Woodbury & Moulton received $235,000 of the $500,000 of stock.

581 CXXIII. That it was not until May or June, 1891, that any charge of fraud was made against the defendants, Bullis and Barse.

CXXIV. That on March 1, 1890, Frank S. Smith wrote to defendant Bullis a letter and enclosed a telegram, copies of which letter and telegram are as follows:

582 "New York, March 1, 1890.

"Spencer S. Bullis, Esq., Olean, N. Y.:

"Dear Sir—I enclose you herewith telegram received this after noon from Messrs. Woodbury & Moulton, asking that a provision be inserted in the mortgage, that in case of a default in the payment of interest on the bonds, upon a foreclosure of the mortgage, the timber land can be sold free of the reservations to you. I have feared that they would ob-
583 ject to the provisions of the mortgage as they stand, and if you will concede this I think we can fix it up by telegraph on Monday.

"Very truly yours.

"FRANK SULLIVAN SMITH,

"By Wilson."

584 [Telegram.]

"Dated Portland, Me.

"Received at 51 William Street.

"3-1-1890.

"To Frank Sullivan Smith:

"Shouldn't there be clause in mortgage providing, in case of default on bonds, for foreclosure of Bullis'

reserved rights on lands, so trustee could sell land, free of all reservation, for benefit of bondholders? Answer. 585

"WOODBURY & MOULTON."

CXXV. That on March 2, 1890, the defendant Bullis answered said letter of which the following is a copy:

"Mch. 2, o. 586

"Frank S. Smith:

"Yours with wire from W. &. M. at hand. I regret exceedingly that they have brought any questions, and trust you will satisfy them on that point. I could not, perhaps, make a change in that mortgage that would meet the point they make, inasmuch as in some instances I do not own the reservations. Whatever the mortgage covers, I, of course, expect will 587 be subject to sale upon any default, the same as any other part of the property. Yours.

"S. S. BULLIS."

"Satisfy them, get their consent and wire me tomorrow that all is well, and send papers for filing. Want to close this now.

"S. S. B."

588

This letter was received at Mr. Smith's office in his absence and was not seen by him until after the litigation began.

CXXVI. That the consideration paid by defendant Bullis for lands described in deeds from Weed, dated February, 1890, and February 18, 1890 (Ex. No. 17), was not one dollar. The consideration ex-

589 pressed in said deeds. The real consideration was $12,000.

CXXVII. That the timber lands. where the lands described in the mortgage are located, vary as to the kind and quantity of the timber; the basin and sides generally have hemlock, while the ridges have hardwood, although both kinds are interspersed.

CXXVIII. That the amount of timber found
590 originally on these lands also varies.

CXXIX. That defendant Barse never engaged in buying, selling or operating timber tracts, and never engaged in lumbering operations.

CXXX. That defendant Barse when he originally presented said enterprise to I. B. Newcombe & Co., did not mention any lands in connection therewith, and did mention a scheme of only $110,000.

591

CXXXI. That defendant Barse, being the president of a bank at Olean, became interested in this enterprise both to aid defendant Bullis, a lumbering man located at Olean, and also because Bullis promised Barse some of the stock of the proposed consolidated railroad.

CXXXII. That about September 1, 1889, the project presented by defendant Barse to I. B. New-
592 combe & Co., was rejected by the latter on the ground that it was too small; that up to that time nothing had been said to defendant Barse about land in any way; and that John Byrne was the first to broach the subject of land in connection with the project.

CXXXIII. That Frank Sullivan Smith acted as counsel for all the parties in this transaction, includ-

ing I. B. Newcombe & Co., John Byrne, Woodbury & Moulton, the defendants Bullis and Barse and the plaintiff O'Beirne. 593

CXXXIV. That defendant Barse did not receive any of the money that came from Woodbury & Moulton from the sale of bonds, and the bank which is controlled by the defendant Barse did not receive any of said money; but $30,000 of said money went to pay a loan guaranteed by Barse. 594

CXXXV. That the $200,000 of capital stock, which, according to the contracts, were to be reserved for the purpose of constructing and completing the extensions of the railroad, was not reserved according to the contracts, but was issued. That it was so issued by agreement of all the parties.

CXXXVI. That after the mortgage was executed by the defendant railroad company and the defendant Bullis, it was altered at the request of Woodbury & Moulton by changing the reservations relating to timber, lumber and wood products from absolute reservations to conditional ones, so that said reservations were to cease and end upon default being made and continued for a period of six months; that the mortgage as changed was never re-executed by the defendant railroad company or the defendant Bullis and his wife. 595 596

CXXXVII. That the changes made in said mortgage are shown by the portions marked in Exhibit "G" with black underlines as follows:

"Excepting and reserving, however, from this conveyance. until default shall have been made by said

railroad company in the performance of all and singular the covenants and agreements of this indenture, and of the bonds and coupons herein mentioned, all the timber, lumber, wood and bark, with the right to the said Spencer S. Bullis, his heirs, executors, administrators and assigns, to enter upon the said lands and premises or any portion thereof, at any time, for the purpose of cutting down, removing and taking away any and all trees, timber, lumber, wood and bark; and also excepting and reserving from this conveyance all oil, petroleum, gas, coal or other minerals upon or in said lands and real estate, and also excepting and reserving the right to enter upon said lands for the purpose of drilling or mining for said oil, petroleum, gas, coal or other minerals, or for the erection and operation of mills or other machinery for the manufacture or handling of lumber or other products of the forest. Provided, however, that the foregoing exceptions and reservations shall cease and determine whenever said railroad company shall make such default, whereupon all rights, title, property, license, easement or privilege of the said Spencer S. Bullis, his heirs, executors, administrators or assigns, in and to or upon all and singular said lands and premises by reason of said exceptions and reservations shall cease and determine, anything to the contrary herein contained notwithstanding, and the same shall at once vest absolutely in the said trustee, the party of the second part hereto, its successor or successors, as fully as if none of said exceptions and reservations had ever been made, and the said trustee shall thereupon have and possess full power and authority to

avail himself of, and shall be entitled to receive, all the 601
benefits and profits of any and all contracts and agreements which may have been at any time theretofore made by the said Spencer S. Bullis, his heirs, executors, administrators or assigns, under or by virtue of any of said exceptions or reservations, or in any way relating to any lumber, timber, wood, bark or other product of the forest, or any coal, iron, oil, petroleum, or other minerals upon, in or under said lands 602
and premises hereby conveyed, as fully as if the same had been made for the sole benefit of the party of the second part, its successor or successors, as trustees for the holders of said bonds and coupons.

"ARTICLE IV.

"In case default shall be made in the payment of any interest, or of any of the aforesaid bonds, or in 603
the payment of the coupons thereto annexed according to the tenor thereof, upon demand made of such payments at the office of the Central Trust Company of New York, or if the said railroad company shall suffer or allow any taxes or charges to fall in arrear, whereby the security of this mortgage may be impaired, or shall refuse or fail to keep or perform any of the covenants and stipulations herein or in said 604
bonds contained, on its part to be kept and performed; and in case any such default shall continue for a period of six months, the said trustee, the party of the second part, personally or by its attorney or agent, may and upon the request in writing of a majority in interest of the holders of said bonds, and upon being properly indemnified against costs and expenses which may be incurred by acting in pursu-

605 ance of such request, shall enter into or upon all and singular the railroad and premises hereby conveyed or intended to be conveyed, and each and every part thereof, and have, hold and use the same, operating by its managers or servants, or other attorney or agents, the said railroad, and lands and premises, conducting the business thereof, and making from time to time all repairs or replacements, and such use-
606 ful alterations, additions and improvements thereto as may seem judicious; and collect and receive all the tolls, freights, incomes, rents, issues and profits of the same, and of every part thereof, and after deducting," etc.

CXXXVIII. That the plan embraced in the several contracts of December 9th was first formulated by John Byrne for I. B. Newcombe & Co., and by
607 W. B. Parsons, with the consent and co-operation of Bullis and Barse.

CXXXIX. That nothing was done under the contract of October 8, 1889, until merged in the contract of December 9, 1889, between Newcombe & Co. and Bullis and Barse.

CXL. That the contracts of December 9, 1889,
608 were prepared and discussed about a week before their execution.

CXLI. That the firm of I. B. Newcombe & Co. knew, prior to the execution of contracts of December 9, 1889, that defendant Barse disclaimed having any title to the lands and that those titles were to come from the defendant Bullis.

CXLII. That the railroad of defendant company

was never constructed to all the lands examined by John Byrne and William B. Parsons on their trip made in November, 1889. 609

CXLIII. That the line of the Kinzua Valley Railroad was located by William B. Parsons, as engineer of the Kinzua Valley Railroad Company, a corporation separate and independent from The Allegheny and Kinzua Railroad Company; that Parsons acted under the direction of Bullis; that the Kinzua Valley Railroad Company was controlled by Bullis, and was designed by all parties to be included in the Allegheny and Kinzua system, said line having been purchased by the construction company. 610

CXLIV. That a certificate was made by William B. Parsons to the Central Trust Company in September, 1890, as follows: 611

"To the Central Trust Company; I hereby certify that five additional miles of track have been completed for the Allegheny and Kinzua Railroad under the terms of the mortgage, dated February 1, 1890, and that said company is entitled to receive thirty-two bonds for the same.

"WILLIAM BARCLAY PARSONS,

"Chief Engineer Allegheny and Kinzua Railroad." 612

CXLV. That the description of railroad lines contained in mortgage was furnished by William B. Parsons.

CXLVI. That at the time of the trip of John Byrne and William B. Parsons over lands in November, 1889, there were saw mills built and in operation on some of the lands seen by them.

514 CXLVII. That the first plan proposed by I. B. Newcombe & Co. did not embrace any lands at all.

CXLVIII. That John Byrne and Frank S. Smith represented I. B. Newcombe & Co., and were authorized to act generally for them in the matter.

CXLIX. That the contracts of October 8 and December 9, 1889, were executed by I. B. Newcombe
515 & Co., relying upon reports made by John Byrne, together with representations made by defendants, Bullis and Barse.

CL. That the capital stock of the Bradford and Corydon Railroad Company of Pennsylvania was $110,000, and the whole capital stock of the consolidated company was $500,000.

516 CLI. That the Railroad Commissioners of New York gave their consent to the proposed increase, based partly upon the explanation of Frank S. Smith that under a contract a sufficient amount of stock and funds of the consolidated company should be held in trust to make a fund wherewith to complete the twenty-four miles of road, and that no stock was ever reserved for that purpose, but the full amount was issued at once by consent of all parties.
617

CLII. That I. B. Newcombe, as a member of the executive committee of the defendant railroad company and the Northern Tier Hemlock Company, Limited; the Keystone Lumber Company, Limited, and the M. P. Dunbar Company, for the removal of the timber from warrants numbers 3710, 3712, 3718, 3699, 3719, 3717, 3708, 3703, 3700, 4871, 4872, 4873, 4874, 400 acres east end 3702, east half 3716; that

said contracts recited that the timber belonged to parties other than the defendant Bullis. 618

CLIII. That the first bonds delivered to anyone were delivered on or about March 14, 1890.

CLIV. That Woodbury & Moulton requested the Central Trust Company to bring action to foreclose the mortgage of the defendant railroad company, and that they themselves did bring such an action in the Circuit Court of the United States for the Western District of Pennsylvania for such foreclosure, subsequent to the bringing of this suit, and said suit in Pennsylvania is still pending. 619

CLV. That Woodbury & Moulton received at the time they purchased the bonds issued by the defendant railroad company 312 1-2 shares of guaranteed stock of the said company of the par value of $31,250, and that such stock was worth, in the opinion of E. H. York, a member of the firm, $18,000. 620

CLVI. That Teodore C. Woodbury, of the firm of Woodbury & Moulton, was a director of the defendant railroad company.

CLVII. That John Byrne is and was President of The Interior Construction and Improvement Company, and owns and owned all of its stock excepting enough to qualify its directors. 621

CLVIII. That Theodore C. Woodbury, I. B. Newcombe, Camille Weidenfeld, F. S. Smith, John Byrne, S. S. Bullis and Mills W. Barse were directors in the defendant railroad company on February 27, 1890.

CLIX. That the holders of $247,000 of the $285,-

621 000 of bonds outstanding and secured by said mortgage requested on April 1st, 1892, the Central Trust Company to foreclose said mortgage.

CLX. That the mortgage on which this action is based does not attempt to convey the fee to the lands therein described, and does not contain any covenant of further assurance.

622 CLXI. That the lands in controversy are situated in the County of Cattaraugus, State of New York, and the County of McKean, State of Pennsylvania.

CLXII. That at the time this suit was commenced there had been no default in the payment of either principal or interest, due under the terms of the mortgage, upon any of the bonds thereby secured.

CLXIII. That John Byrne was a director in the
623 Kinzua Valley Railroad Company.

CLXIV. That the Central Trust Company has brought a suit to foreclose the railroad mortgage, and said suit is still pending and undetermined.

CLXV. That warrants 4871, 4917, 1,000 acres of 3731 and 3714, were timbered lands Feburary 27th, 1890.

624 CLXVI. That warrants 3710 and 3712 were timbered lands February 27th, 1890.

CLVII. That warrants 2396 and 4913 were timbered lands.

CLVIII. That warrants 4335 and 4336 were sold and released after the mortgage was executed, for which warrants the defendant Bullis received five dollars per acre.

CLXIX. That it is impossible for the defendants Ballis and Barse to specifically perform their agreements to place or cause to be placed under the lien of the mortgage of the defendant, The Allegheny and Kinzua Railroad Company, thirty thousand acres of timber land of the description hereinbefore referred to, as constituting a compliance with their said agreements. 625

And I do further find the following 626

CONCLUSIONS OF LAW.

I. That the said contracts and agreements, Exhibits "A," "B" and "C," and the said mortgage, Exhibit "D," should be construed together, and are parts of the general scheme or agreements sought to be enforced by the plaintiff.

II. That the plaintiff has a right to enforce said scheme or agreement and maintain this action for the benefit of himself and all other bondholders under the said mortgage of the defendant railroad company. 627

III. That the defendants Ballis and Barse fully ratified the amendment of said mortgage by the insertion limiting the reservation of timber land, and that said mortgage may be enforced to the same extent and effect as though the same had been so executed after said amendment was made. 628

IV. That the defendants Ballis and Barse have not complied with their contracts annexed to the complaint herein, in that, among other things, they have failed to place under the lien of the mortgage

629 of the defendant railroad company to the Central Trust Company of New York, as trustee, dated February 1st, 1890, 30,000 acres of timber land of the character described in the said agreement.

V. That the plaintiff is entitled upon the evidence to a decree for the specific performance of the agreements undertaken by said Bullis and Barse, so far as the same relates to the following lands, to wit:
630 Twenty-eight thousand one hundred acres of land situate in the County of Cattaraugus, New York, or the County of McKean, Pennsylvania, contiguous or tributary to the line of railroad of the defendant, The Allegheny and Kinzua Railroad Company, and timbered so as to be profitable to said corporation, and of the value of at least $18.00 per acre.

VI. That in case the defendants are unable to
631 convey those portions of the land to which said Bullis did not have title, within the time hereinafter limited, the plaintiff is entitled to an award of damages, to be paid to the defendant, Central Trust Company, by the defendants, Bullis and Barse, as hereinafter directed.

VII. That the plaintiff need not show that the defendants are able to perform their contract in order
632 to entitle them to a decree as prayed.

VIII. The impossibility of performance on the part of the defendants is matter of defense.

IX. That the plaintiff need not show that the defendants had or have other land out of which they could satisfy the decree or judgment prayed.

X. That this Court has jurisdiction to proceed in

this cause by reason of fraud practiced by the defendants, Bullis and Barse,: in the premises. 633

XI. That this Court, having obtained jurisdiction of the subject matter of this cause of action, will retain the same until the whole subject is disposed of.

XII. The fact that the plaintiff has been deceived by the fraudulent statements and misrepresentations of the defendants, is sufficient of itself to cause a court of equity to entertain this suit. 634

XIII. I find that the plaintiff is entitled to judgment against the defendants, Spencer S. Bullis and Mills W. Barse, for the immediate specific performance by them, the said Bullis and Barse, of their contracts and agreements to place, or cause to be placed, under the lien of the mortgage of the defendant, The Allegheny and Kinzua Railroad Company, to the defendant Central Trust Company of New York, dated February 1, 1890, a copy of which said mortgage is annexed to the complaint as "Exhibit "D," and that they convey or cause to be conveyed to said Trust Company for that purpose thirty thousand acres of land, free and clear of all encumbrances, and contiguous or tributary to the line of railroad of the defendant, The Allegheny and Kinzua Railroad Company, which said land shall be timbered and profitable to said defendant railroad company, and of the market value of at least $18.00 per acre. 635 636

XIV. That the defendants, Spencer S. Bullis and Mills W. Barse, at once pay to the Central Trust Company of New York the sum of $292,125.00, with interest thereon at the rate of five per cent. per annum from the first day of February, 1892, for the pro

637 rata benefit of the plaintiff, James R. O'Bierne, and all other holders of the first mortgage bonds of the defendant, The Allegheny and Kinzua Railroad Company.

XV. That the plaintiff have judgment accordingly with costs.

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638 SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of THE ALLEGHENY AND KINZUA RAILROAD COMPANY,

Plaintiff,

Against

Judgment.

639 SPENCER S. BULLIS, MILLS W. BARSE, and CENTRAL TRUST COMPANY OF NEW YORK, and Another,

Defendants.

The issues of this action having been regularly brought on for trial before Hon. George C. Barrett, Justice, presiding, at a Special Term of this Court, on the 19th day of February, 1895, and the Court having
640 heard the allegations and proofs of the parties and the argument of counsel, and after due deliberation having duly made and filed on the 12th day of June, 1895, a decision in favor of the plaintiff against the defendants, Spencer S. Bullis and Mills W. Barse, which decision as amended by the Court on the 24th day of June, 1895, states concisely the grounds upon which the issues herein were decided, and directs judgment in favor of the plaintiff against the defend-

ants, Spencer S. Bullis and Mills W. Barse, for the relief hereinafter adjudged, it is now, on motion of Frank Sullivan Smith ,attorney for the plaintiff. 641

Ordered, adjudged and decreed, that said defendants, Spencer S. Bullis and Mills W. Barse, forthwith pay to the defendant, Central Trust Company of New York, the sum of two hundred and ninety-two thousand, one hundred and twenty-five dollars, with forty-nine thousand, six hundred and twenty and 65-100 dollars interest thereon at the rate of five per centum per annum from February 1st, 1892, making in all the sum of three hundred forty-one thousand, seven hundred forty-five and 65-100 dollars for the equal pro rata benefit of the plaintiff and all other holders of the first mortgage bonds of the defendant, The Allegheny and Kinzua Railroad Company. 642

And it is further ordered, adjudged and decreed, that the plaintiff, James R. O'Beirne, have and recover of the said defendants, Spencer S. Bullis and Mills W. Barse, the costs of this action (including an allowance in addition to costs of $2,000 which is hereby awarded to plaintiff), amounting in all to the sum of $3,586.40. 643

GEORGE C. BARRETT,

J. S. C. 644

HENRY D. PURROY,

Clerk.

645 SUPREME COURT,

CITY AND COUNTY OF NEW YORK.

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of THE ALLEGHENY AND KINZUA RAILROAD COMPANY,

Plaintiff,

Against

646 SPENCER S. BULLIS, MILLS W. BARSE, and CENTRAL TRUST COMPANY OF NEW YORK, and Another,

Defendants.

Please take notice, that upon the pleadings, the decision of Mr. Justice Barrett herein and exceptions to the findings and refusals to find to be duly taken and filed herein, and upon the case to be made, set-
647 tled and filed herein, and upon the interlocutory judgment entered herein upon the 29th day of June, 1895, the undersigned will move this Court at a General Term to be held at the County Court House in the City of New York on the first Monday of October, 1895, at the opening of the Court on that day, or as soon thereafter as counsel can be heard, for a new trial of said exceptions, and for such other or further relief as may be just.

648

FRANK RUMSEY,
Attorney for defendants Bullis and Barse.

To Frank Sullivan Smith, Esq., Attorney for Plaintiff, 54 Wall St.; Messrs. Butler, Stillman & Hubbard, Attorneys for defendant Central Trust Company of New York; Henry D. Purroy, Esq., Clerk of the City and County of New York.

SUPREME COURT, 649
CITY AND COUNTY OF NEW YORK.

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of THE ALLEGHENY AND KINZUA RAILROAD COMPANY,
Plaintiff,
Against
SPENCER S. BULLIS, MILLS W. BARSE, and CENTRAL TRUST COMPANY OF NEW YORK, and Another,
Defendants. 650

SIRS: You will please take notice that the defendants, Spencer S. Bullis and Mills W. Barse, and each of them, hereby appeal to the General Term of the Supreme Court, First Department, from the decision of Mr. Justice Barrett, made the 29th day of June, 1895, and filed and entered in the office of the Clerk of the City and County of New York on said date, 651
and from the judgment entered on said decision, made the 29th day of June, 1895, and entered in the office of the clerk of said county on the said date, which orders and adjudges that the defendants, Spencer S. Bullis and Mills W. Barse, forthwith pay to the Central Trust Company of New York the sum of $292,125.00 with $49,620.65 interest at the rate of five per cent. per annum from February 1, 1895, 652
for the pro rata benefit of the plaintiff and all other holders of first mortgage bonds of the Allegheny and Kinzua Railroad Company; and further ordering and adjudging that the plaintiff recover of said defendants the sum of $3,586.40 costs and allowance, and from each and every part of said decision and judgment.

Dated July 5, 1895.

Yours, etc.

FRANK RUMSEY,
Attorney for Defendants,
Spencer S. Bullis and Mills W. Barse.

653 To Frank Sullvan Smith, Esq., Attorney for plaintiff, 54 Wall Street, New York City; Messrs. Butler, Stillman & Hubbard, Attorneys for Defendant, Central Trust Co. of New York; Hon. Henry D. Purroy, Clerk of the City and County of New York.

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654 At a term of the Appellate Division, Supreme Court, First Department of the State of New York, held at the Court Rooms, 111 Fifth Avenue in the City of New York, on the 20th day of March, 1896.

Present:

Hon. Charles H. Van Brunt,

Presiding Justice.

655 Hon. William Rumsey,
Hon. Morgan J. O'Brien,
Hon. George L. Ingraham, JJ.

JAMES R. O'BEIRNE,
Plaintiff,
Against
SPENCER S. BULLIS, MILLS W. BARSE, CENTRAL TRUST COMPANY OF NEW YORK, AND THE ALLEGHENY AND KINZUA RAILROAD COMPANY,
Defendants.

656

The plaintiff respondent herein having on the 29th day of June, 1895, recovered a judgment against Spencer S. Bullis and Mills W. Barse, the appellants herein, for $3,586.40 costs and allowance and directing payment by said appellants to the Central Trust Company of New York of the sum of three hundred

and forty-one thousand seven hundred and forty-five 657
65-100 dollars ($341,745.65), and by an appeal by the defendants having been taken from the said judgment and the same having come on to be heard during the February Term of this Court, and after hearing counsel in support of the said appeal and counsel in opposition thereto, and after due deliberation having been had, it is

ORDERED, that the judgment appealed from be 658
and the same is affirmed with costs.

SUPREME COURT. APPELLATE DIVISION.
FIRST DEPARTMENT.

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of The Allegheny and Kinzua Railroad Company, 659
Plaintiff,
Against
SPENCER S. BULLIS, MILLS W. BARSE, THE ALLEGHENY AND KINZUA RAILROAD COMPANY AND THE CENTRAL TRUST COMPANY OF NEW YORK,
Defendants.

660

The defendants Spencer S. Bullis and Mills W. Barse having appealed from the judgment entered herein on the 29th day of June, 1895, in favor of the plaintiff for $3,586.40 costs and allowance, and directing payment by said defendants Spencer S. Bullis and Mills W. Barse to the Central Trust Company of New York of the sum of three hundred and forty-

661 one thousand seven hundred and forty-five dollars and sixty-five cents, to the Appellate Division of the Supreme Court, and said appeal having been argued upon the case and exceptions, and said Appellate Division having ordered said judgment to be affirmed, as hereinafter directed, with the costs and disbursements of said appeal to said plaintiff, respondent, and said costs having been duly taxed by the Clerk of this Court upon due notice;

662

Now upon motion of Frank Sullivan Smith, attorney for the plaintiff, it is :

ADJUDGED AND DECREED, That the judgment appealed from be and the same is affirmed, and that the plaintiff, James R. O'Beirne recover of the defendants, Spencer S. Bullis and Mills W. Barse, the sum of one hundred ninety-four dollars and eighteen cents ($194.18), cost of said appeal.

663

Judgment signed this 14th day of May, 1896.

HENRY D. PURROY,

Clerk.

A Copy

HENRY D. PURROY, Clerk.

664 (Seal)

At a Term of the Appellate Division of the Supreme Court, First Department of the State of New York, held at the Court Rooms, 111 Fifth Avenue in the City of New York, on the 20th day of March, 1896. 665

Present:

Hon. Charles H. Van Brunt, Presiding Justice.

Hon. William Rumsey, 666

Hon. Morgan J. O'Brien,

Hon. George L. Ingraham, JJ.

JAMES R. O'BEIRNE, Ets.,
Plaintiff Respondent,
Against
SPENCER S. BULLIS, MILLS W. BARSE, THE CENTRAL TRUST COMPANY OF NEW YORK and Another,
Defendants Appellants. 667

James R. O'Beirne, the plaintiff respondent herein having on the 29th day of June, 1895, recovered an interlocutory judgment against Spencer S. Bullis and Mills W. Barse, for three thousand five hundred and eighty-six dollars and forty cents, costs and allowance directing that the said defendants Bullis and Barse forthwith pay to the defendant the Central Trust Company of New York the sum of three hundred and forty-one thousand seven hundred and forty-five dollars and sixty-five cents for the equal pro rata benefit of the plaintiff and all other holders of the first mortgage bonds of the defendant the Allegheny & Kinzua Railroad Company, and the defendants Spencer S. Bullis and Mills W. Barse hav- 668

669 ing upon the pleadings herein; the decision of Mr. Justice Barrett; exceptions to the findings and refusals to find duly taken herein; the case upon appeal and upon the interlocutory judgment so entered, having made a motion to the Appellate Division, Supreme Court, First Department at the February Term thereof of a new trial on the said exceptions and the same having duly come to be heard and after hearing counsel in support of the said motion for a
670 new trial and counsel in opposition thereto and after due deliberation having been had, it is

ORDERED, that the motion for a new trial be and the same is hereby denied.

A COPY Enter C. H. V. B. P. J.

ALFRED WAGSTAFF,

671 (Seal) Clerk Appellate Division,

Supreme Court, First Department.

ENDORSED.

Filed May 13th, 1896.

ALFRED WAGSTAFF,

Clerk Appellate Division,

672 Supreme Court, First Department.

SUPREME COURT, NEW YORK COUNTY. 673

JAMES R. O'BEIRNE, on Behalf of Himself and all Other Bondholders of The Allegheny and Kinzua Railroad Company,

Plaintiff,

Against

Spencer S. Bullis, Mills W. Barse, The Allegheny and Kinzua Railroad Company, and Central Trust Company of New York, 674

Defendants.

Gentlemen:

You will please take notice that the defendant Spencer S. Bullis hereby appeals to the Court of Appeals from the judgment of the Appellate Division for the First Department, entered herein in the office of the Clerk of the City and County of New York, 675 May 14th, 1896, which judgment affirms a judgment entered in this action in favor of the plaintiff on the 29th day of June, 1895; and said defendant appeals from the whole and every part of said judgment of affirmance. And you will please take further notice that the appellant intends to bring up for review on said appeal the order of affirmance entered herein on the 13th day of May, 1806. 676

You will please take further notice that the defendant Spencer S. Bullis hereby appeals to the Court of Appeals from the order of the Appellate Division for the First Department, entered herein in the office of the Clerk of the County of New York on the 13th day of May, 1896, which order denies a motion for a new trial of the action, made on behalf of the said

677 defendant, and the said defendant appeals from the whole and every part of said order denying a motion for a new trial.

Dated Buffalo, May 15th, 1895.

FRANK RUMSEY,
Attorney for Defendant Bullis,
Mooney-Brisbane Building,
678 Buffalo, N. Y.

To

Frank Sullivan Smith, Esq.,
Attorney for Plaintiff.

To

Messrs. Butler, Stillman & Hubbard,
Attorneys for Defendant, Central Trust
679 Company, and

To

The County Clerk of New York County.

Court of Appeals, } ss.
State of New York, }

680 Pleas in the Court of Appeals held at the Capitol in the City of Albany on the 28th day of February in the year of Our Lord, one thousand eight hundred and

691 ninety-nine before the Judges of said Court.

Witness, The Hon. Alton B. Parker, Chief Judge, Presiding.

W. H. SHAVELAND,
Clerk.

Remington Morris and Riggs

693 JAMES R. O'BRIEN, on behalf of Himself and all Other Stockholders of THE ALLEGHENY AND KINZUA RAILROAD COMPANY,
Respondent,
Against
SPENCER S. BELLS, et al
Appellants.

692 BE IT REMEMBERED that on the 29th day of May in the year of our Lord one thousand eight hundred and ninety-six Spencer S. Bells and Wm W. Bates, the appellants in this action, came here into the Court of Appeals, by Frank Ramsey and Sprague, Mont, Sprague & Brownell, their respective attorneys, and filed in the said Court, Notices of Appeal and return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And 692 James R. O'Brien on behalf of himself and the respondent in said action, afterwards appeared in said Court of Appeals by Frank Sullivan Smith, his attorney. Which said Notices of Appeal and the return thereto filed as aforesaid are hereto annexed.

WHEREUPON the said Court of Appeals having heard this cause argued by Messrs. Adelbert Moot and John G. Milburn of counsel for the Appellants,

685 and by Messrs. Frank Sullivan Smith, Hamilton Odell, C. Walter Artz and Adrian H. Joline of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment and order of the Supreme Court appealed from in this action, be in all things AFFIRMED.

And it was further ordered and adjudged that the
686 respondent recover against the appellants costs of appeal to this Court.

And it was also further ordered, that the record aforesaid and the proceedings in this Court be remitted to the said Supreme Court, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment and order be in all things AFFIRMED with
687 costs as aforesaid, and stand in full force, strength and effect.

And thereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals as aforesaid by them given in the premises, are by the said Court of Appeals remitted unto the Supreme Court of the State of New York, before the Justices thereof, according to the form
688 of the statute in such case, made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, etc.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the
State of New York.

Court of Appeals Clerk's Office,
Albany, March 2nd, 1899.

689

I hereby certify that the preceding record contains a correct transcript of the proceedings in said action in the Court of Appeals, with the papers originally filed therein, attached thereto.

W. H. SHANKLAND,
Clerk.

(Seal)

690

At a Special Term of the Supreme Court, held at the County Court House, Part I, in the City of New York on the 27th day of March, 1899.

Present:

Hon. Leonard A. Giegerich.

691

JAMES R. O'BEIRNE, et al.,
Plaintiff,
Against
SPENCER S. BULLIS, Et al

The defendant having appealed to the Court of Appeals from the judgment heretofore, and on the 14th day of May, 1896, entered in the above entitled action affirming the judgment entered in said action 692
on the 29th day of June, 1895, and said Court of Appeals having heard the said appeal, and having ordered and adjudged that said judgment so appealed from be affirmed and judgment rendered for the plaintiff with costs.

NOW upon filing the remittitur from said Court of Appeals and upon motion of Frank Sullivan Smith, attorney for said plaintiff, it is

693 ORDERED, that said judgment of the Court of Appeals be and the same is hereby made the judgment of this Court, and that the aforesaid judgment entered herein on the 14th day of May, 1896, be and the same is hereby affirmed, and that judgment of this Court be entered herein affirming said judgment, with costs of said appeal, against the defendant, to
694 be taxed.

Ent. L. A. G.,

J. S. C.

SUPREME COURT, COUNTY OF NEW YORK.

JAMES R. O'BEIRNE, on Behalf of Himself, etc.,
Plaintiff,
695 Against
SPENCER S. BULLIS, et al.,
Defendants.

JUDGMENT, April 4th., 1899.

A judgment in this action having been rendered in this Court on the 29th day of June, 1895, upon a trial by the Court at Special Term directing the payment
696 by the defendants, Spencer S. Bullis and Mills W. Barse to the Central Trust Company of New York of the sum of three hundred forty-one thousand seven hundred and forty-five dollars and sixty-five cents ($341,745.65), and that the plaintiff, James R. O'Beirne have and recover of the said defendants, Spencer S. Bullis and Mills W. Barse cost and allowance amounting to three thousand five hundred eighty-six dollars forty cents (3,586.40); and the defendants having appealed from said judgment to the

697

Appellate Division of this Court for the First Department, and the said judgment having been affirmed in all things by this Court at said Appellate Division, and judgment of affirmance having been rendered thereon upon the 14th day of May, 1896, that the plaintiff recover against the defendants one hundred ninety-four dollars and eighteen cents (194.18) costs of said appeal; and the defendants 698
having appealed therefrom to the Court of Appeals and the said Court of Appeals having sent hither its remittitur filed herein on the 7th day of March, 1899, by which it appears that the said Court of Appeals has affirmed the said judgment in all things with costs and has given judgment accordingly and has remitted the judgment of said Court of Appeals to this Court to be enforced according to law and this Court having on due notice by an order entered 699
herein on the 27th day of March, 1899, ordered that said judgment be made the judgment of this Court, and the plaintiff's costs and disbursements on said appeal having been duly adjusted by the Clerk of this Court at the sum of $194.45; now on motion of Frank Sullivan Smith, attorney for the plaintiff,

IT IS ADJUDGED, that the judgment of the said Court of Appeals be, and the same is hereby made 700
the judgment of this Court; and that the plaintiff have execution against the defendants for the costs of said appeal adjusted by the clerk in the amount of one hundred ninety-four dollars and forty-five cents ($194.45), as well as for the amount of costs and allowance adjudged to be recovered by the plaintiff in and by the judgment of this Court in this cause, entered the 29th day of June, 1895, and further that the Central Trust Company of New York have exe-

701 cution against the defendants for the amount adjudged to be paid to it by said defendants in and by the judgment of this Court in this cause, entered the 29th day of June, 1895, and that this judgment be annexed to the judgment roll.

WM. LOHMER,
Clerk.

702

SUPREME COURT.

IN THE MATTER OF THE APPLICATION
of
SPENCER S. BULLIS FOR DISCHARGE OF JUDGMENTS OF RECORD.

703 Sirs: Please Take Notice that upon the petition of Spencer S. Bullis herewith served, and the discharge in bankruptcy, a copy of which is hereunto attached, this court will be moved on behalf of petitioner at a special term thereof to be held at the Court House in the City of Buffalo on the 8th day of July, 1901, at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, to the end that an order may be made and issued in
704 accordance with the prayer of said petitioner, or for such other or further relief as seems just.

Dated June 25th, 1901.

CARY, RUMSEY & HASTINGS,
Attys. for Petitioner.

To James R. O'Beirne
and Central Trust Company of New York.

SUPREME COURT. 705

IN THE MATTER OF THE APPLICATION
of
SPENCER S. BULLIS FOR DISCHARGE OF JUDGMENTS OF RECORD.

To the Supreme Court of the State of New York:

Your petitioner Spencer S. Bullis respectfully 706
shows as follows:

First: That heretofore, to wit, on or about the 29th day of June, 1895 one James R. O'Beirne recovered a judgment in this court against your petitioner and one Mills W. Barse for the sum of $3,586.40, which judgment was entered in the Clerk's office of the City and County of New York on said day, and a transcript thereof was filed in the Clerk's office of 707
Cattaraugus County, and judgment docketed in said last mentioned county for said amount on the 2nd day of July, 1895, and that said judgment still remains of record in said county of Cattaraugus and said city and county of New York unsatisfied and undischarged.

Second: That on or about the 29th day of June, 708
1895, the Central Trust Company of New York recovered a judgment against your petitioner and said Barse for the sum of $341,745.65, which judgment was duly entered in the Clerk's office of the City and County of New York on said day in favor of the said trust company and against petitioner and said Barse. That thereupon, to wit, on the 2nd day of July, 1895, a transcript of said judgment was filed in the Clerk's

709 office of the County of Cattaraugus and said judgment was docketed therein, and still remains upon records of said county as a judgment against your petitioner and said Barse for said amount, unsatisfied and undischarged.

Third: That on or about the 14th day of November, 1898, your petitioner duly filed his petition in bankruptcy in the District Court of the United States
710 for the Northern District of New York in pursuance of, and in accordance with the provisions of the act of Congress entitled, "An Act to establish a uniform system of bankruptcy throughout the United States" approved July first, 1898, and thereupon was adjudged a bankrupt. That thereafter such proceedings were had in said district court of the United States which had jurisdiction of the person and proceedings. That on the 19th day of September, 1899,
711 your petitioner was by the judgment and decision of said district court, and under and in pursuance of the provisions of said act of Congress, duly and fully discharged from all his debts and claims which by said act was made provable against his estate, and which existed on the 14th day of November, 1898, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy, and the
712 order and decision of said district court so made was duly entered and issued to your petitioner, a copy of which is hereto attached, and still remains in full force and effect.

And your petitioner further alleges upon information and belief that by reason of said discharge and the force and effect thereof he became discharged from said judgments hereinbefore stated, the same

not being excepted from the operations of the discharge in bankruptcy. 713

Fourth: Your petitioner further shows that at the first meeting of creditors in said bankrupt proceedings the said James R. O'Beirne and the said Central Trust Company appeared by their attorneys and presented to the referee in bankruptcy in such bankrupt proceedings, and put in evidence before said referee the judgment roll upon which said judgments were entered, and made proof thereof before said referee. 714

Fifth: That said judgments or either of them are not liens upon any real estate prior to the time he was so aforesaid adjudged a bankrupt. That no other or previous application has been made herein.

WHEREFORE your petitioner prays that an order be made directing said two judgments to be cancelled and discharged of record as to him, and that the Clerk of said County of Cattaraugus and said City and County of New York shall cancel and discharge the same by marking on the docket thereof that the same is cancelled and discharged as to him by order of the Court, stating the date of entry of the order of discharge, or for such other or further relief as to the court may seem just. 715 716

SPENCER S. BULLIS,

Petitioner.

State of New York, }
Cattaraugus County, } ss.

Spencer S. Bullis being duly sworn deposes and says that he resides at Olean, N. Y. That he has read

717 the foregoing petition and knows the contents thereof. That the same is true of his own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

SPENCER S. BULLIS.

Sworn to before me
this 22d day of June, 1901.
718

GEORGE A. LARKIN,
Notary Public.

DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

IN THE MATTER
of
719 SPENCER S. BULLIS, Bankrupt.
In Bankruptcy No. 246.

Whereas Spencer S. Bullis of Olean in the County of Cattaraugus and State of New York has been duly adjudged bankrupt under the Act of Congress entitled, "An Act to establish a uniform system of bankruptcy throughout the United States," ap-
720 proved July 1st, 1898, and appears to have conformed to all the requirements of law in that behalf.

It is therefore ordered by the court that said Spencer S. Bullis be forever discharged from all debts and claims which by said act are made provable against his estate, and which existed on the 14th day of November, 1898, on which day the petition for adjudication was filed, excepting such debts, if any,

as are by law excepted from the operation of a dis 721
charge in bankruptcy.

Given under my hand and the seal of the Court at the City of Buffalo, N. Y., in
(L. S.) said district this 19th day of September, A. D., 1899.

O. C. COXE, Judge.

Attest: 722

CHARLES B. GERMAIN,
Clerk.

SUPREME COURT.

IN THE MATTER OF THE APPLICATION
of
SPENCER S. BULLIS FOR DISCHARGE OF JUDGMENTS OF RECORD. 723

State of New York,
Erie County.

C. Walter Artz being duly sworn deposes and says that he is of Council for James R. O'Beirne and The Central Trust Company of New York City. That he has read what purports to be a petition by Spen- 724
cer S. Bullis and in reply thereto states that what are referred to as two judgments in the first and second paragraphs of the said alleged petition are contained in a single paper called a judgment which was rendered in the case of James R. O'Bierne against Spencer S. Bullis and others pending in the Supreme Court in the County of New York; deponent attaches hereto a copy of the judgment in said action

725 as the same is contained in the case on appeal prepared by Council for said Bullis. (Said judgment appearing in this record at page —).

Deponent further states on information and belief that it is not true as stated in the said petition that the discharge of the said Bullis in bankruptcy will operate to discharge him from liability under the judgment or judgments referred to in said petition
726 as having been rendered in said case of O'Bierne against Bullis and others, for the reason among others that the claim upon which said suit was brought was the actual fraud of the said Bullis and one M. W. Barse and by reason thereof the said claim falls within the exception specified in Section 17 of the National Bankruptcy Act of 1898.

Deponent further states that as he verily believes
727 this application is in effect a motion in said action of O'Bierne against Bullis and others, and should be made in the County of New York, where said judgment or judgments were rendered. And he verily believes that this application is not made in the said county because of the denunciation heretofore made thereon by the Courts in New York County against said Bullis and Barse and their fraudulent practices.

728 The deponent further says that on a former trial of the said action of O'Bierne against Bullis and others, beginning in the City of New York, on the 7th day of October, 1892, counsel for the defendants Bullis and Barse (Mr. Moot), made the following statement which is contained on page 129 of the case on appeal from the judgment rendered by the Special Term in New York County, namely, "If there

be any cause of action alleged in this case, the cause 729
of action is in fraud, and we demand a jury trial as a matter of right." That the Courts held such action to be in fraud as appears from the reports thereof, but that the motion for a jury trial was denied, the Court having taken jurisdiction in equity.

Deponent therefore prays that this motion may be dismissed as improperly noticed outside the county of New York, and further prays that if the same 730
should be entertained it may be dismissed upon its merits.

C. WALTER ARTZ.

Sworn before me this
fifteenth day of July, 1901.
PERRY E. WURST,

Notary Public.

731

At a Special Term of the Supreme Court held in and for the County of Erie at the City and County Hall in the City of Buffalo on the 26th day of August, 1901.

Present, Hon. Truman C. White, Justice.

732

SPENCER S. BULLIS FOR DISCHARGE OF JUDGMENTS OF RECORD.
of
IN THE MATTER OF THE APPLICATION

The application of Spencer S. Bullis herein for an order directing certain judgments in favor of James R. O'Beirne and the Central Trust Company of New

York, to be cancelled and discharged of record as to the said Spencer S. Ballis, and that the Clerk of the County of Cattaraugus and the Clerk of the City and County of New York, cancel and discharge the same by marking on the docket that the same is cancelled and discharged as to Spencer S. Ballis by order of the court and granting to the plaintiff other and further relief coming on to be heard on the 15th day of July, 1901, upon the petition of Spencer S. Ballis, the notice of motion hereto annexed in support of said application, and the affidavit of C. Walter Arts, verified on the 15th day of July, 1901, and the judgment roll in the case of O'Beirne vs. Ballis, in opposition thereto, and after hearing Hon. Charles S. Cary and Adalbert Moot, Esq., of counsel for said Ballis in support of said application, and C. Walter Arts, Esq., of counsel for the Central Trust Company of New York and James R. O'Beirne in opposition thereto, it is now on motion of Messrs. Butler, Notman, Joline & Mynderse, attorneys for Central Trust Company of New York, and Frank Sullivan Smith, Esq., attorney for said James R. O'Beirne

ORDERED that the said motion be, and the same is hereby denied upon the merits, with $10.00 costs.

Enter in Cattaraugus County.

SUPREME COURT 947

CATTARAUGUS COUNTY

IN THE MATTER OF THE APPLICATION OF

ex parte

Sirs:

Notice is hereby given on behalf of Spencer S. Bullis, petitioner herein, that he hereby appeals from the order entered herein in the Clerk's office of Cattaraugus County on the 3rd day of September, 1901, denying the motion herein, which order was made by Hon. Truman C. White, Justice, at a special term held in Erie County on the 30th day of August, 1901, and from the whole thereof to the Appellate Division of the Supreme Court to and for the Fourth Judicial Department.

Dated September 18th, 1901.

CARY, BUSHNELL & BUSHNELL,

Attys. for Petitioner Bullis,

Olean, N. Y.

To the Clerk of Cattaraugus County.

Butler, Notman, Johns & Wyndham,

Attys. for Central Trust Co. of New York,

and Frank Sullivan Smith, Esq.,

Atty. for James R. O'Beirne.

741 SUPREME COURT, ERIE COUNTY.

IN THE MATTER OF THE APPLICATION
of
SPENCER S. BULLIS FOR DISCHARGE OF JUDGMENTS.

State of New York,
County of Erie,
742 City of Buffalo,

WILLIAM H. STANLEY, being duly sworn, deposes and says: That he is an attorney and counselor at law and managing clerk for Moot, Sprague, Brownell & Marcy, of counsel for appellant, Spencer S. Bullis, in the above entitled proceeding; that no opinion was given by Justice White, who rendered the decision herein, as deponent is informed and
743 verily believes.

Sworn to before me, this
26th day of October, 1901.

WM. H. STANLEY.

M. E. BURKE,
Notary Public in and for
Erie County.

744

SUPREME COURT, APPELLATE DIVISION, 745
FOURTH JUDICIAL DEPARTMENT,
CLERK'S OFFICE, ROCHESTER, N. Y.

I, Newell C. Fulton, Clerk of the Appellate Division of the Supreme Court in the Fourth Judicial Department, do hereby certify that the following is a copy of the order made by said court upon the appeal in the above entitled action or proceeding, and 746
entered in my office on the 7th day of January, 1902, and that the original case or papers upon which said appeal was heard are hereunto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said court, at the City of Rochester, this 10th day of January, 1902.

[Seal.]

747

NEWELL C. FULTON,
Clerk.

Entered January 31, 1902, served February 3, by mail.

748

749 At a term of the Appellate Division of the Supreme Court, held in and for the Fourth Judicial Department, at the City of Rochester, on the 7th day of January, 1902.

Present—Honorable William H. Adams, Presiding Justice; Honorable Peter B. McLennan, Honorable Alfred Spring, Honorable
750 Pardon C. Williams, Honorable Frank H. Hiscock, Associate Justices.

In the Matter of the Application of SPENCER S. BULLIS, for discharge of Judgments, etc.

The above named Spencer S. Bullis, the appellant in this action, having appealed to the Appellate Division of the Supreme Court from an order of the Su-
751 preme Court entered in the office of the Clerk of the County of Cattaraugus on the 3rd day of September, 1901, and the said appeal having been argued by Mr. Adelbert Moot and C. S. Cary, of counsel for the appellant, and by Mr. C. Walter Artz, of counsel for the respondent, and due deliberation having been had thereon.

It is hereby ordered that the order so appealed
752 from be and the same is hereby affirmed, with ten dollars costs and disbursements.

Opinion by Spring, J. All concur.

NEWELL C. FULTON,
Clerk.

SUPREME COURT, FOURTH APPELLATE DIVISION. 753

In the Matter of the Application of SPENCER S. BULLIS for Discharge of Judgments.

Present, Adams, Presiding Justice; McLennan, Spring, Williams and Hiscock, Associate Justices.

Appeal from an order entered in the Clerk's office of Cattaraugus County on the 3rd day of September, 1901, denying the motion made on behalf of Spencer S. Bullis for the discharge of record of judgments against him. 754

This proceeding was commenced by the petition of the appellant which shows that he has been discharged from his debts in compliance with the National Bankrupt Law; that more than one year has elapsed since such discharge; that two judgments recited in the petition are docketed against him, and the motion for their cancellation and discharge is made pursuant to section 1268 of the Code of Civil Procedure. The judgment creditor opposed the motion and the material facts contained in the record presented are set forth in the accompanying opinion. 755

C. S. Cary and Adelbert Moot for the appellant. 756

C. Walter Artz for the respondent.

Spring, J.

The petitioner upon this motion was adjudicated a bankrupt September 19th, 1900. There were two judgments entered against him in 1895, one of $3,586.40 and one of $341,745.65, and this motion was

757 for the purpose of relieving the petitioner from the liability of these judgments. The judgment creditor contests the application on the ground that the judgments were recovered by reason of the fraud of the said Bullis and one Barse.

The question before us involves the construction of Subdivisions 2 and 4, Section 17, Chapter 3 of the National Bankrupt Law of 1898. Section 17 so far
758 as applicable provides:

"Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; * * * (4) were created by his
759 fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The action in which the judgments were rendered was not one at law for fraud and deceit, but was a suit in equity, and in order to appreciate the situation it becomes necessary to analyze the complaint and the decision of the court.
760

The allegations of the complaint with the exhibits attached show that on the 8th day of October, 1889, Spencer S. Bullis and Mills W. Barse owned the capital stock of three railroad companies, to wit, the Allegany and Kinzua R. R. Co., a corporation organized under the laws of Pennsylvania, a New York corporation of like name, and the Bradford and Cory-

don R. R. Co., also a Pennsylvania corporation. 761
These railroad lines were constructed for the purpose of reaching the timber on a large tract near the Allegany River. The combined length of the railroads at that time was sixteen miles, but the length contemplated with the radiating lines completed was thirty miles. Said Bullis and Barse also owned thirty thousand acres of timber land in McKean County, Pennsylvania, and also other tracts of timber land in 762
that vicinity. They desired financial aid in the development of their scheme and on the date mentioned entered into a written agreement with I. B. Newcombe and Co., a firm of New York bankers, and this agreement is designated schedule "A" of Exhibit "A".

By the terms of this agreement said Bullis and Barse were to execute a trust mortgage or deed to 763
the Central Trust Co. of New York, as trustee, as security for first mortgage bonds to the amount of $250,000, bearing interest at five per cent. and payable thirty years from date. The said mortgage was to cover the properties and franchises of said railroad corporations and also the said thirty thousand acres of land. All of said property was to be under the management of a new corporation capitalized at
$250,000. The said bankers undertook to negotiate 764
at par $210,000 of said bonds and to pay over the avails to said Bullis and Barse as the railroad was completed along in sections of five miles. The new corporation was to be managed by seven directors, three of whom were to be elected by said bankers, so that Bullis and Barse were to retain a majority in the management of the company. There are various

765 other provisions in the agreement, for instance as to an option given to the bankers to purchase all the capital stock of the corporation at a fixed price and that the real estate within the dominion of said corporation was to be "contiguous or tributary to one or the other of said several railroads and they shall be timbered and profitable to said corporation," and that the new corporation should be organized and
766 the title transferred to it and the trust instrument executed and the bonds ready to be delivered on or before January 1st, 1890. A modification of said agreement was made by another contract entered into between the same parties on the 9th day of December, 1889. This agreement provided for the merger and consolidation of these railroads with a capital stock of $500,000 at par value and for the issue of a "first mortgage or deed of trust" upon all
767 of the property of the corporation to said Central Trust Co. of New York, as trustee, for $500,000 to secure gold bonds to that amount. The scheme designed by the modified agreement was the extension of the railroad lines to seventy miles and the inclusion of 16,000 acres of additional timber land, thus bringing within the ownership of the new company 46,000 acres all told. By this agreement only $300,-
768 000 of the bonds issued were to be put upon the market at once, and they were to represent forty-six miles of completed railroad. Newcombe and Company undertook to dispose at par of $200,000 of this bond issue to be used as the road was completed and put in operation by sections of five miles, and in the manner set out at length in the second paragraph of the agreement. The time for the consummation of the agreement by the transfer of the title, etc., was

by this contract extended to February 1st, 1890. 769
Bullis and Barse were empowered to enter into a contract with the Interior Construction and Improvement Company for the purpose of causing the merger and consolidation of said several railroads and to cause the construction and completion thereof into one connected system. Two agreements were accordingly on the 9th day of December, 1889, entered into by said Construction Company, one with 770
the Allegany and Kinzua Railroad Company, which was owned by Bullis and Barse, and one with them individually providing for the construction and consolidation of these railroads, and the contract outlined the manner in which the moneys arising from the bond issues were to be distributed, a large part of which was to be paid to Bullis and Barse, and also provided for the deposit of a certain amount with the trustees named. 771

The complaint further charges that said Bullis and Barse "falsely and fraudulently pretended and represented to said firm of I. B. Newcombe & Co." that said tract of 30,000 acres to be conveyed was free and clear from all incumbrances, that all of said land was contiguous or adjacent to the line of said railroad as the same was then constructed or surveyed and projected, and the said land was covered by a large 772
quantity of merchantable timber capable of yielding and producing seventy tons of freight in timber, lumber and bark for each acre of land for transportation over said railroad. It is further alleged that in fulfillment of the said agreements the defendant railroad corporation on the 1st day of February, 1890, executed "its first mortgage or deed of trust" to said

773 trust company conveying to it said railroad properties and franchises and providing for an issue of bonds limited to $500,000.00 to be secured by said properties and the forty-six thousand acres of timber land to be conveyed by said Bullis and Barse to said trustee. "That the defendants Bullis and Barse caused said Bullis and Sarah E., his wife, to join with said railroad company in said mortgage," and that
774 by said mortgage they assumed to convey to said trustee land contiguous to the line of said railroad and free from incumbrances and covered by a large quantity of merchantable timber, aggregating 30,954.10 acres, and which by the terms of the said agreements was to be a condition precedent to the issue of $300,000 of said bonds to be used in the building and completion of said forty-six miles of said railroad. That in reliance upon the conveyance
775 of the said land bonds to the amount of $300,000 were issued and were sold by said Newcombe & Co., ten of which were purchased by the plaintiff in the action. That all of the proceeds of the said bonds have been used in the construction of said lines and in payment of prior liens upon the property and the said constituent lines, and that the defendant railroad company, which is the consolidated company, is
776 wholly without funds, and that the extension thereof is essential to enable it to obtain money to meet its liabilities. That said Bullis and Barse refused to convey to said trustee the remaining 16,000 acres of such land and to provide for the building of the balance of said railroad whereby the construction company is unable to proceed with its work of completing the same.

The complaint further alleges that said 30,954.10 777
acres of land conveyed by Bullis and his wife were not free of incumbrances. That the same at that time were subject to prior liens aggregating $159,000, besides interest. That $144,776.07 of said indebtedness still remain unsatisfied. That said land was not covered with merchantable timber, but was waste land from which the salable timber had been removed, and that a large portion of the said land 778
was not adjacent to the line of said railroad, and the timber thereon not accessible to be transported thereon. That a large portion of the land so assumed to be conveyed was not owned by either of the said defendants and was not conveyed at all by said deed. All of which facts the said Bullis and Barse "well knew at the time they made" said pretended conveyance, and said conveyance "is in reality false and fraudulent." That by reason of the "fraud 779
and failure" of said Bullis and Barse to convey said land free of liens "a great fraud has been committed" by them which will cause irreparable injury to the bondholders, including the plaintiff, who is one of them, unless the performance of the said agreements and the conveyance of 30,000 acres of unencumbered timber land to said trustee are specifically decreed.

The complaint further charges many derelictions of 780
duty by said Bullis and Barse as directors of the said railroad corporation and the diversion from their proper use "fraudulently and secretly" of steel rails and other properties belonging to said company, and they threaten further unlawful expenditures upon the credit and at the expense of the said company. That by reason of the unlawful acts of said Bullis and Barse

781 the earning capacity of the company has been seriously impaired. That pursuant to a provision in said trust conveyance providing for the release from the lien of the said mortgage of "any portion or portions of said timber land" upon payment of the value of the portions so released to be ascertained by arbitrators appointed as the said conveyance provided, arbitrators were appointed upon the request of Bullis
782 and Barse and appraised over four thousand acres of said land at one dollar per acre. That it is apparent therefrom that said Bullis and Barse "had perpetrated a gross fraud" upon said railroad company and upon the bondholders as said land if timber land was of the value of $25 per acre. The complaint then asked for specific performance; "or that said defendants pay to said trustee, for the security of said bondholders, such a sum of money as the court shall as-
783 certain to be equivalent to the value of said lands and real estate, conveyed as aforesaid, which are not in conformity with the terms of said several agreements, and said bonds and the mortgage or deed of trust securing the same; and in addition thereto 10,000 acres of like timber land, in all respects similarly situated, and free from encumbrance, as security to authorize the issue of $200,000 of bonds, in said agree-
784 ments specified and set apart for the construction of the twenty-four miles of railroad company additional to the forty-six miles above mentioned."

The complaint, therefore, is one in equity demanding that the defendants comply with their several agreements and charging that the defendants in their attempted compliance therewith falsely and fraudulently foisted upon the trustee a conveyance which only apparently transferred the title to the large

quantity of land described in it, and that this fictitious 785
transfer was in pursuance of the fraudulent scheme on the part of the said defendants, and the complaint asked for money compensation in the event of the inability of the defendants to fulfill their undertakings.

A trial was had at a Special Term in New York County and at the close of the evidence it appeared that Bullis and Barse were unable to perform specifically and the court dismissed the complaint, de- 786
clining to entertain jurisdiction for the purpose of awarding damages in lieu of strict performance. The judgment entered on this decision was reversed by the General Term (80 Hun, 570), and upon an appeal taken by the defendant railroad company this judgment of reversal was affirmed by the Court of Appeals (151 N. Y., 372). A new trial was had in the meantime upon the answers interposed by Bullis and 787
Barse before Mr. Justice Barrett, and elaborate and explicit findings of fact were made by him fully sustaining the charges contained in the complaint and upon which the allegations of fraud were based. The Special Term among other facts found that before the execution of the several agreements referred to that said "Bullis and Barse pretended and represented to the said firm of I. B. Newcombe & Co. that the said 30,000 acres of land were timbered, free and 788
clear of all encumbrances, and contiguous and adjacent to the line of the defendant railroad company, as the same was then constructed and projected, and that said land was covered by a large quantity of merchantable timber which would be sufficient to and would actually provide said railroad with at least 70 tons of freight to the acre, for conveyance over said

789 railroad at rates from 25 to 50 cents per ton, in addition to the percentage accruing to said defendant railroad company from divisions with other lines." Further that before said agreements were entered into at the request of Bullis and Barse, engineers were sent from New York to inspect the timber on the land to be conveyed to said trustee. That "they were escorted through certain timber lands" by said
790 Bullis, and the lands through which they "were escorted by said Bullis were heavily timbered," and that said Bullis "stated that said lands were to be placed under said mortgage" to said trustee, and a report in accordance with this statement was made by said engineers, and upon this report said Newcombe & Co. "embarked in the enterprise and entered into said scheme of consolidation and extension." That said lands so "defined and pointed out by said Bullis
791 were worth from eighteen to twenty dollars an acre." Again that said Bullis and Barse "had stated and represented to Newcombe & Company" that the mortgage was to be a first lien, the lands to be well timbered and "contiguous and tributary to said lines of railroad." That said trust mortgage was approved and accepted in the belief that said representations were true in fact and that Bullis and Barse were "in
792 good faith performing their said covenants." The court further found:

"XCIII. That the statements and representations of said defendants Bullis and Barse with respect to said timber lands, mentioned and referred to in said Exhibits "A", "B", and "C" and Schedule "A" annexed to the complaint, were fraudulent and made with intent to deceive.

XCIV. That the plaintiff was in fact deceived by said statements and representations. 793

XCV. That said statements and representations were false and untrue.

XCVI. That said agreement was in fact fraudulently made with respect of the lands agreed to be conveyed by said Bullis and Barse." That a great part of the lands included in the deed were not the property of Bullis, and the value of that owned by him and not timbered was $13,350, while that apparently covered by the deed but not owend by him was worth $175,502.77, and a considerable part of that included in the conveyance was encumbered. 794

In the conclusions of law the court decides it has "jurisdiction to proceed in this cause by reason of the fraud practiced by the defendants Bullis and Barse in the premises;" and by the "fact that the plaintiff has been deceived by the fraudulent statements and misrepresentations of the defendants." It directed "immediate specific performance" by them by their conveying to the trust company "30,000 acres of land free and clear of all incumbrances and contiguous and tributary to the lines of the railroad of the defendant * * * timbered and profitable to said defendant railroad company and of the market value of at least $18 per acre." Finally the court directs and decides: "That the defendants, Spencer S. Bullis and Mills W. Barse, at once pay to the Central Trust Company of New York the sum of $292,125.00, with interest thereon at the rate of five per cent. per annum from the first day of February, 1892, for the pro rata benefit of the plaintiff, James R. 795 796

797 O'Bierne, and all other holders, of the first mortgage bonds of the defendant, The Allegany and Kinzue Railroad Company." The judgment entered upon this decision was affirmed (2 App. Div., 545) (158 N. Y., 466).

The action for specific performance in the strictest sense thereof was founded upon the actual positive fraud of the defendants Bullis and Barse. They had
798 in fact in pretended compliance with their agreements conveyed to the designated trustee 30,000 acres of land. The plaintiff alleged that the defendants fraudulently included in this conveyance lands not owned by the grantors and that the bulk of the tract was not timber land, was encumbered and was not adjacent to the railroad lines described. Lands so located and with heavy growing timber had been
799 shown to the engineers selected to inspect it and a conveyance to a trustee of the lands represented was sought by the action. The gist, the intrinsic ingredient of the action was consequently the fraudulent scheme, the false representations of these defendants. As was said by the Court of Appeals in its first review of the case (151 N. Y., at page 384): "The theory of the complaint and the tendency of the proof upon the trial were that a fraudulent scheme was devised by
800 Bullis and Barse."

Jurisdiction was held to exist in the court of equity to award damages in lieu of decreeing specific performance in case the proof disclosed the inability to enforce a precise compliance with the agreements. When it developed upon the second trial that specific performance was unavailing the trial court retained jurisdiction to proceed "by reason of the fraud prac-

ticed by the defendants Bullis and Barse." The back- 801
bone of the action, whether viewed strictly as one in equity or for damages in lieu of equitable relief to compensate the bondholders for the misconduct of the defendants was the fraud of the latter.

As we interpret subdivision 2 of section 17 of the Bankrupt Law it does not limit the exception to common law actions of fraud or deceit. The gist and gravamen of the action must have been the positive 802
and intentional fraud of the bankrupt. The record presented must clearly show that such misconduct was the pith of the action, and it may not be dependent upon oral proof or other evidence outside of the record. There are many authorities construing the kindred section of the Bankrupt Law of 1867, which provided "that no debt created by the fraud or embezzlement of the bankrupt * * * * shall be 803
discharged under this act."

In Strang vs. Bradner, 114 U. S., 555, the discharge in bankruptcy was interposed to an action charging false and fraudulent representations made by one member of a co-partnership which included the defendants, who were not cognizant of the representations made. The court held that the fraud of the co-partner was imputable to the other members 804
of the firm, and in defining the fraud which was within the purview of the section quoted decided that it "should be construed to mean positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality."

805 The same principle was reiterated and the authorities analyzed in Forsyth vs. Vehameyer, 177 U. S., 177, and the court at page 182 thus defines the representation which constitutes a fraud: "A representation as to a fact made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral
806 turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent." In the authorities which I have examined no stress is laid upon the form of the action. While an action of fraud to the mind of a lawyer signifies the common law action of fraud or deceit, the wording of the subdivision under discussion evidently was not framed with that precise remedy in
807 view. The expression "judgments in actions for frauds" conveys no such signification as that mentioned, and may include any positive intentional fraud which was the basis of a judgment and was of the substance of the recovery. The statute is to be construed liberally to discharge the insolvent from the burden of the obligations which he is unable to pay in full, but that liberality may not be extended to
808 an insolvent to release him from a judgment which was recovered against him by reason of his "positive fraud and intentional wrong," whatever may have been the form of the action in which the recovery was had. The primary purpose of the statute is to enable an insolvent debtor to be relieved from the burden of his obligations. One exception that has pervaded all of our bankrupt laws is that where the insolvent has become liable for the payment of a debt which had its

origin in his own positive dishonesty, the way is not 809
open for his discharge from that liability. In one instance proof that the debt was created by fraud was sufficient to raise the barrier. In another the debt must have ripened into judgment, but in each case the fraudulent misconduct is the basis of the prohibition, not the technical form which the indebtedness has assumed.

As was said in Collier on Bankruptcy (3rd Ed.) at 810
page 197: "The fact that the judgment was in an action for fraud, or willful or malicious injury may, perhaps, not appear by the judgment itself. That is not necessary; it is sufficient if it appear from the record of the case. If the record show that the action was for any of the causes specified, then the judgment is not barred by a discharge. The action must have been based on the fraud or the willful or 811
malicious injury. It is not enough that there may have been incidental or immaterial, false and fraudulent representations in connection with the transaction, if the action is not based on them." And also at page 202: "The debt as we have seen under subdivision 2, is not released by a discharge, although in the form of a judgment. But the record must show that the debt is so created. If a judgment is rendered in an action, the record of which shows material, 812
traversable allegations of fraud which were necessarily determined, then the judgment is conclusive." In Matter of Lewensohn, 99 Fed. Rep., 73, Justice Brown says: "In cases of this kind no purely technical considerations as to the precise form of the action should be regarded."

813 In Burnham vs. Pidcock, 58 App. Div., 273, the action in which the judgment was recovered was for conversion. Neither the judgment nor anything in the record showed that fraud or fraudulent representations were an essential element of the cause of action, although the court in its opinion stated the act which constituted the conversion was fraudulent. The court held that the nature of the action must be
814 gathered from the record instead of from any extrinsic source. The court uses this language at page 275: "The judgments which are excepted from the effect of a discharge in bankruptcy are, as it is expressed in the statute, judgments for fraud. The phrase means that the fraud is the gravamen of the action in which the judgment is recovered, and that proof of the fraud is essential to the right of recovery. It does not include a judgment in which the
815 right of recovery is based upon an act which is not essentially fraudulent, although in that action fraud may be incidentally shown." That case is not an authority which is helpful to the appellant. In the present case the record shows that fraud was the marrow of the cause of action and the sole ground for retaining jurisdiction and awarding damages was the fraudulent conduct of Bullis and Barse.

816 No resort need be had to extraneous proof to show that fraud was not an incident, but the vital factor in the action. The findings of fact passed upon by the trial judge are minute and circumstantial, and abound in facts from which the turpitude and deceit of the defendants are established. These findings are supplemented by conclusions of law and the whole followed by the formal judgment which bears the signature of the justice presiding, so that

the record consists of the decision and judgment 817
made by the justice himself and forming one complete document. We think the respondent is not concluded because he elected to proceed by suit in equity. He did not base his cause simply upon breach of contract, but on the fraud of Bullis and Barse, and emphasis is given to that element in the various appeals. The court in its opinion in 80 Hun say at page 573: "That the facts found * * con- 818
clusively show that Spencer S. Bullis and Mills W. Barse perpetrated an atrocious fraud." The Court of Appeals (158 N. Y., 466), in discussing its previous decision observes at page 468: "The theory upon which the decision proceeded was that they devised a fraudulent scheme for the consolidation of certain railroads owned and controlled by them, issued bonds upon false representations as to the timber lands to be furnished as added security under the 819
mortgage to make the bonds secure and salable, that upon those facts the court would have been justified in granting relief to the plaintiff against them." With the fraud of the petitioner so marked a constituent in the record of which the judgment is a part we are constrained to hold that he is not entitled to the cancellation of the judgment as it is within the prohibition of subdivision 2 of section 17 referred to. 820

The counsel for the respondent devotes much space in his brief to an argument that subdivision 4 of section 17 applies to this appeal. The position is that the terms, "fraud, embezzlement, misappropriation" in that subdivision relate to an individual while the word "defalcation" alone applies to one "acting as an officer or in a fiduciary capacity." We

821 cannot assent to that construction. In the corresponding section (33) of the Act of 1867, the interpretation contended for may have been tenable. In the present section, however, the exceptions have been remodeled and reclassified, and the intention apparently was to make subdivison 2 applicable to frauds, etc., perpetrated by an individual failing debtor, but protected him by limiting the prohibition
822 against his discharge, to frauds, false representations, etc., embodied in a judgment and provable by the record. Subdivision 4 was then designed to relate to an officer or one acting in a trust capacity, and was enlarged in its scope by erecting a barrier to the discharge of such a culpable debtor who had been guilty of "fraud, embezzlement, misappropriation," as well as "defalcation." A person faithless in a public or trust capacity is the more flagrant male-
823 factor, and hence it may have been deemed advisable to extend the barrier to his receiving the benefit of a discharge permitted by the statute to include the other delinquencies named. The natural rendition of subidivision 4 as well as its grammatical construction seems to favor this interpretation. If any debt created by fraud, embezzlement or misappropriation is to be excepted from the application of the statute
824 then there is no necessity of subdivision 2 making a judgment essential to prevent the granting of the discharge under the statute. The bare proving the debt was created by fraud would be sufficient to raise a bar to the release of the insolvent therefrom, which would be tantamount to emasculating subdivision 2. We conclude, however, that the petitioner is barred by subdivision 2 from obtaining the cancellation of the judgments and that the order of the Special

Term should therefore be affirmed with ten dollars 825
costs.

The order is affirmed with ten dollars costs and the disbursements of this appeal.

All concur.

SUPREME COURT.

In the Matter of the Application of SPENCER S. BULLIS for discharge of Judgments, etc. } 826

Gentlemen:—

PLEASE TAKE NOTICE that Spencer S. Bullis, appellant in the above entitled proceeding, appeals to the Court of Appeals of the State of New York from the order of the Supreme Court entered in the 827
office of the Clerk of Cattaraugus County on the 31st day of January, 1902, which order affirms an order of the Supreme Court entered in the office of the Clerk of said County of Cattaraugus on the 3rd day of September, 1901, and from the whole of said order.

Dated at Olean, N. Y., February 18th, 1902.

Yours, etc., 828

CARY, RUMSEY & HASTINGS,
Attorneys for Appellant,
Office and P. O. Adrress,
Olean, N. Y.

To the Clerk of the County of Cattaraugus,
And to Frank Sullivan Smith,
Attorney for James R. O'Beirne, Respondent,
And to Butler, Notman, Joline & Mynderse,
Attorneys for Central Trust Co. of New York,
Respondent.

COURT OF APPEALS.

In the Matter of the Application of SPENCER S. BULLIS for Discharge of Judgments.

IT IS HEREBY STIPULATED, by and between the parties hereto, by their respective attorneys, that the foregoing copies of summons, complaint, exhibits, answer, findings, judgment, notices of appeal and orders, opinion, and of all the foregoing papers, are true and correct copies of the originals of each and all of said papers in said proceeding, and of the whole thereof, entered and on file in the office of the Clerk of the County of Cattaraugus, and the same may be used on the argument herein with the same force and effect as if certified by the Clerk, certification by the said Clerk being hereby waived.

Dated April 15, 1902.

CARY, RUMSEY & HASTINGS,
Attorneys for Spencer Bullis,
Appellant.

FRANK SULLIVAN SMITH,
C. WALTER ARTZ,
Of counsel,
Attorney for James R. O'Beirne,
Respondent.

BUTLER, NOTMAN, JOLINE & MYNDERSE,
Attorneys for Respondent, Central Trust Co.

COURT OF APPEALS, }
State of New York, } ss:

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 27th day of June, in the year of our Lord one thousand nine hundred and two, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remittitur June 28th 1902.

In the Matter of the *the* Application of SPENCER S. BULLIS for Discharge of Judgments, &c.

Be it remembered, that on the 22nd day of May in the year of our Lord one thousand nine hundred and two, Spencer S. Bullis the appellant in this proceeding, came here unto the court of appeals, by Cary, Rumsey and Hastings, his attorneys, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the fourth judicial department. And James R. O'Beirne and Central Trust Co. of New York, the respondents in said proceeding afterwards appeared in said court of appeals by Frank Sullivan Smith and Butler, Notman, Joline & Mynderse, their respective attorneys,

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed. Whereupon, the said court of appeals, having heard this proceeding argued by Mr. Adelbert Moot of counsel for the appellant, and by Mr. C. Walter Artz, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court, appealed from herein be, and the same hereby is affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

Therefore, it is considered that the said order be, and the same hereby is affirmed, with costs as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

[Seal Cattaraugus County, New York. Incorporated March 11, ——.]

COURT OF APPEALS, CLERK'S OFFICE,
ALBANY, *June 28th*, 1902.

I hereby certify, that the preceeding record contains a correct transcript of the proceedings in said proceeding in the court of appeals, with the papers originally filed therein attached thereto.

W. H. SHANKLAND, *Clerk.*

Supreme Court, County of Cattaraugus.

In the Matter of the Application of SPENCER S. BULLIS for Discharge of Judgment of Record.

Please take notice that the remittitur in the above action has been filed in the office of the clerk of the county of Cattaraugus and that on the 29 day of September, 1902, the undersigned will move this court at a special term at the *county court house* in the city of Buffalo at 10 o'clock in the forenoon or as soon thereafter as counsel can be heard, for an order that judgment be entered thereon.

Dated September 16, 1902.

FRANK SULLIVAN SMITH,
Attorney for James R. O'Beirne.

To Messrs. Cary, Rumsey & Hastings, att'ys for Spencer S. Bullis.

Endorsed: Filed Oct. 1, 1902.

At a special term of the supreme court held in and for the county of Cattaraugus, at the county court house in the city of Buffalo on the 29th day of September, 1902.

Present: Hon. Truman C. White justice.

In the Matter of the Application of SPENCER S. BULLIS for Discharge of Judgments of Record.

This cause having been brought on upon the remittitur herein sent down from the court of appeals, and now filed in this court by which remittitur it appears that an appeal was taken by the said Spencer S. Bullis from the judgment of this court to said court of appeals and that such appeal has been dismissed by said court with costs and that the record proceedings had been directed by said court of appeals to be remitted to this court and this court directed to enforce the said judgment of the court of appeals, according to law, now therefore on motion of Frank Sullivan Smith, of counsel for James R. O'Beirne,

It is ordered and adjudged that the judgment of the said court of appeals be and the same is hereby made the judgment of this court and that the said James R. O'Beirne on behalf of himself and all other bondholders of the Allegheny and Kinzua Railroad Company, have execution against the said Spencer S. Bullis for the costs when adjusted by the clerk and inserted in the judgment and that this order be annexed to the judgment roll.

Endorsed: Erie special term Sep. 29, 1902. Granted and ordered entered in Cattaraugus county clerk's office. Perry E. Wurst. sp. dep. clerk. Filed Oct. 1, 1902.

[Endorsed:] Supreme court. Cattaraugus county. In the matter of the application of Spencer S. Bullis for discharge of judgment of record. Order for judgment below on remittitur. Frank Sullivan Smith, attorney for James R. O'Beirne, No. 54 Wall street, New York, N. Y. Oct. 7 1902

Supreme Court, Cattaraugus County.

In the Matter of the Application of SPENCER S. BULLIS for Discharge of Judgment of Record.

An order having been entered in this proceeding in favor of James R. O'Beirne on behalf of himself and all other bondholders of the Allegheny and Kinzua Railroad Company against Spencer S. Bullis, having been rendered in this court upon the 26th day of August, 1901, and also for $10.00 costs, and the said Spencer S. Bullis having appealed from said order to the appellate division of this court for the fourth department, and said order having been affirmed in all things by this court at said appellate division and judgment of affirmance having been rendered thereon the 7th day of January, 1902, that the said James R. O'Beirne, on behalf of himself and all other bondholders of the Allegheny and Kinzua Railroad Company, recover against the said Spencer S. Bullis, $10.00, costs and the costs of said appeal; and the said Spencer S. Bullis having appealed therefrom to the court of appeals and the said court of appeals having sent hither its remittitur filed herein the 8th day of July, 1902, by which it appears that the said court of appeals has affirmed the said judgment in all things, with costs, and has given judgment accordingly and has remitted the judgment of said court of appeals to this court, to be enforced according to law, and this court having on due notice by an order herein entered the 29th day of September, 1902, ordered that said judgment be made the judgment of this court, and the defendants' costs and disbursements having been duly adjusted by the clerk of this court, at the sum of one hundred forty-three dollars seventy-one cents ($143.71),

Now on motion of Frank Sullivan Smith, attorney for James R. O'Beirne,

It is adjudged, that the judgment of said court of appeals be and the same is hereby made the judgment of this court; and that the said James R. O'Beirne, on behalf of himself and all other bondholders of the Allegheny and Kinzua Railroad Company, have execution against the said Spencer S. Bullis for the costs as adjusted by the clerk, in the amount of one hundred forty-three dollars seventy-one cents ($143.71) and that this judgment be annexed to the judgment roll.

Judgment signed Oct. 1, 1902, 11 a. m.

[Seal Cattaraugus County, New York. Incorporated March 11, ——.]

E. E. KELLEY, *Clerk.*

[Endorsed:] Supreme court, Cattaraugus county. In the matter of the application of Spencer S. Bullis for discharge of judgment of record. Judgment on remittitur. Frank Sullivan Smith, att'y for James R. O'Beirne. Rec'd Oct. 7, 1902. Filed Oct. 1 1902, 11 a. m.

Supreme Court, Cattaraugus County.

In the Matter of the Application of SPENCER S. BULLIS for the Discharge of Certain Judgments.

STATE OF NEW YORK, *Clerk's Office, Cattaraugus County,* } *ss:*

I, E. E. Kelley, clerk of said county and also clerk of the supreme court, being a court of record held therein, do hereby certify that I have compared the annexed copy of record on appeal to the court of appeals, remittitur, order and judgment, and of all other proceedings had and entered in the above cause, and copy of endorsements thereon, with the originals thereof and their endorsements, entered and on file in this office, and find that the same are true transcripts of and from said originals, and of the whole of each of said originals; that attached thereto are the petition for a writ of error, with opinion of the appellate division and assignment of errors, writ of error, with allowance endorsed thereon, citation with admission of service thereon, and copy of bond.

In witness whereof, I have hereunto set my hand and affixed the seal of said county, at Little Valley, this 15th day of June, A. D. 1903.

[Seal Cattaraugus County, New York. Incorporated March 11, ——.]

E. E. KELLEY, *Clerk.*

UNITED STATES OF AMERICA:

Supreme Court.

In the Matter of the Application of SPENCER S. BULLIS for the Discharge of Certain Judgments.

To the Hon. Rufus W. Peckham, associate justice of the Supreme Court of the United States:

Comes now Spencer S. Bullis, the petitioner named in the above entitled proceeding, and says:

That heretofore, to wit, on or about the 29th day of June, 1895, in a certain action then pending in the supreme court of the State of New York, wherein one James R. O'Beirne on behalf of himself and all other bondholders of the Allegheny and Kinzua Railroad Company, was plaintiff, and your petitioner Spencer S. Bullis, Mills W. Barse and Central Trust Company of New York and another, were parties defendant, the said James R. O'Beirne recovered a judgment of and against this petitioner Spencer S. Bullis and the said Mills W. Barse for the sum of three thousand five hundred and eighty-six dollars and forty cents ($3,586.40) costs, which judgment was entered and docketed in the office of the clerk of the county of New York.

That in and by the same judgment it was further adjudged and decreed that the said defendants Spencer S. Bullis and Mills W. Barse pay to the defendant Central Trust Company of New York, the sum of three hundred and forty-one thousand seven hundred forty-five dollars and sixty-five cents ($341,745.65) for the equal *pro rata* benefit of the plaintiff James R. O'Beirne and all other holders of the first mortgage bonds of the defendant The Allegheny and Kinzua Railroad Company.

That on the 2nd day of July, 1895, a transcript of said judgment was filed in the clerk's office of Cattaraugus county of the State of New York, and said judgments were docketed therein and still remain upon the records of said county as judgments against your petitioner and said Barse for said amount, unsatisfied and undischarged.

Your petitioner further represents that the action above referred to in which said judgments were recovered was brought to enforce the specific performance of certain contracts set forth in the complaint therein, which said contracts were annexed to and formed a part of said complaint, as will more fully appear by a reference to said complaint and said contracts, and other proceedings and records in said action.

That on or about the 14th day of November, 1898, your petitioner Spencer S. Bullis duly filed his petition in bankruptcy in the district court of the United States for the northern district of New York in pursuance of and in accordance with the provisions of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898, and thereupon was duly adjudicated a bankrupt.

That thereafter such proceedings were had in said district court of the United States, which had jurisdiction of the person and proceedings, that on the 19th day of September, 1899, your petitioner was by the judgment and decision of said district court, and under and in pursuance of the provisions of said act of Congress, duly and fully discharged from all his debts and claims which by said act was made provable against his estate, and which existed on the 14th day of November, 1898, excepting such debts, if any, as are by law excepted from the operation of a discharge in bankruptcy, and the order and decision of said court so made was duly entered and issued to your petitioner and still remains in full force and effect.

Your petitioner further represents on his information and belief that by reason of said discharge and the force and effect thereof, he became and was discharged from said judgments hereinbefore stated and set forth, and that said judgments were not in any way excepted from the operation of the said discharge in bankruptcy.

Your petitioner further represents that at the first meeting of creditors in said bankruptcy proceedings the said judgment creditors James R. O'Beirne and the said Central Trust Company of New York appeared by their attorneys and presented to the referee in bankruptcy in such bankruptcy proceedings and put in evidence before said referee the judgment roll upon which said judgments were entered, and made proof thereof before said referee.

Your petititioner further represents that there is in force and effect in the State of New York a certain statute of said State of New York commonly known as the "Code of Civil Procedure" of said State, and that in and by section 1268 of said Code of Civil Procedure it is enacted and provided as follows:

"At any time after one year has elapsed, since a bankrupt was "discharged from his debts, pursuant to the acts of Congress relat- "ing to bankruptcy, he may apply, upon proof of his discharge, to "the court in which a judgment was rendered against him, or if "rendered in a court not of record, to the court of which it has be- "come a judgment by docketing it, or filing a transcript thereof, for "an order, directing the judgment to be cancelled and discharged "of record. If it appears upon the hearing that he has been dis- "charged from the payment of that judgment or the debt upon "which such judgment was recovered an order must be made

"directing said judgment be cancelled and discharged of record; "and thereupon the clerk of said court shall cancel and discharge "the same by marking on the docket thereof that the same is can- "celled and discharged by order of the court, giving the date of the "entry of the order of discharge. Where the judgment was a lien "on real property owned by the bankrupt prior to the time he was "adjudged a bankrupt, the lien thereof upon said real estate shall "not be affected by said order and may be enforced, but in all other "respects the judgment shall be of no force or validity, nor shall the "same be a lien on real property acquired by him subsequent to "his discharge in bankruptcy. Notice of the application accom- "panied with copies of the papers upon which it is made, must be "served upon the judgment creditor, or his attorney of record in "said judgment, in the same manner as prescribed in section- seven "hundred and ninety-six and seven hundred and ninety-seven of "the Code of Civil Procedure, if the residence or place of business of "such creditor, or his attorney is known, but if unknown and can- "not be ascertained after due diligence, or if such creditor is a non- "resident of this State, and his attorney is dead, removed from, or "cannot be found within the State, upon proof of said facts by affi- "davit a judge of the court may make an order that the notice of "such application be published in a newspaper designated therein "once a week for not more than three weeks, which publication "shown by the affidavit of the publisher shall be sufficient service "upon such judgment creditor, of the application."

That after the expiration of one year after the discharge of your petitioner from his debts in said bankruptcy proceedings your petitioner herein presented his petition to the supreme court of the State of New York praying for an order directing the cancellation and discharge of said judgments aforesaid of record as to him, the petitioner pursuant to the provisions and directions of said section 1268 of the Code of Civil Procedure. That upon the presentation of said petition the said judgment creditors James R. O'Beirne and Central Trust Company of New York appeared and opposed the granting of said application. That the said special term of the supreme court of the State of New York by its order bearing date the 26th day of August, 1901, denied said motion and application for a cancellation and discharge of said judgments of record, upon the merits, with $10.00 costs of said motion, which order was thereafter entered and filed in the office of the clerk of Cattaraugus county, N. Y.

That thereupon your petitioner duly appealed from said order to the appellate division of the supreme court, and said appeal was thereafter argued and submitted to said appellate division for its decision and determination, and thereafter by an order of said appellate division of the supreme court made on the 7th day of January 1902, the said order so appealed from, as aforesaid, was affirmed with ten dollars costs and disbursements of said appeal.

That attached hereto and forming a part of this petition is a copy of the opinion of Mr. Justice Spring handed down by said appellate division upon the decision of said appeal.

That thereupon your petitioner further appealed from said decision and order of the appellate division of said supreme court, to the court of appeals of the State of New York, which said court is the court of last and final resort in said State of New York.

That said appeal was duly argued and submitted to the said court of appeals, and thereafter the said court of appeals by its decision and judgment, bearing date the 8th day of July, 1902, in all things confirmed said order so as aforesaid appealed from, with the costs of aid appeal. That said court of appeals rendered no opinion upon he decision of said cause.

That thereafter and on the 29th day of September 1902, by an order of the special term of said supreme court, the judgment of the court of appeals was directed to be made the judgment of said supreme court, and thereupon and on the first day of October, 1902, a judgment was entered and filed in the office of the clerk of Cattaraugus county, N. Y., making said judgment of the court of appeals the judgment of said supreme court, and further adjudging that the said James R. O'Beirne on behalf of himself and other bondholders of the Allegheny and Kinzua Railroad Company, recover of and from your petitioner Spencer S. Bullis, the sum of one hundred and forty-three dollars and seventy-one cents ($143.71) costs.

That in every step of said proceeding asking for a cancellation and discharge of said judgments, in the special term and in the hearing and argument of said appeals, both in the appellate division and in the court of appeals, your petitioner claimed and insisted that his said discharge granted him in said bankruptcy proceedings in law and in fact discharged and released your petitioner from all liability under and by reason of the rendition and recovery of said judgments above set forth in said action brought by the said James R. O'Beirne, but that notwithstanding said contention and claim said supreme court of the State of New York, and said appellate division thereof, and said court of appeals, each and all held, decided and adjudged adversely to said claim, and declined and refused to direct the cancellation of said judgments, as provided in the said Code of Civil Procedure of the State of New York and the provisions of the said bankruptcy act. That in so holding, deciding and adjudging the said supreme court of the State of New York and said appellate division thereof, and said court of appeals, your petitioner alleges on his information and belief, committed errors to the prejudice of your petitioner, all of which will appear in the assignment of errors filed with this petition. That the said supreme court of the State of New York in holding and adjudging that your petitioner was not entitled to an order cancelling said judgments of record,

and said appellate division and court of appeals in affirming said judgment or order of the court below, and said supreme court in making the order, making the judgment and order of the court of appeals the judgment of the supreme court and directing and adjudging that your petitioner pay said James R. O'Beirne the sum of one hundred and forty three dollars and seventy-one cents ($143.71) costs of said appeal, erred and drew in question the validity of the statute of, and the authority exercised by and under the act passed by Congress of the United States, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898, and of the provisions of the Constitution of the United States giving power to Congress to establish uniform laws on the subject of bankruptcies throughout the United States in that said courts of the State of New York refused to give full force and effect to the discharge so granted to your petitioner from his provable debts and liabilities, as provided in said act.

Your petitioner further alleges upon his information and belief that your petitioner is a resident of the State of Mississippi, residing at Natchez in said State and that James R. O'Beirne is a resident of the city of New York, and that the Central Trust Company of New York is a corporation organized under the laws of the State of New York and located in the city of New York.

Wherefore your petitioner prays that a writ of error may issue to the supreme court of the State of New York, or to the proper court, for the correction of the errors complained of, and that a duly authenticated transcript of the record, proceedings and papers herein may be sent to the said Supreme Court of the United States.

Buffalo April 25 1903.

SPENCER S. BULLIS,
By ADELBERT MOOT,
His Attorney.

STATE OF NEW YORK, }
County of Erie, City of Buffalo, } ss:

Adelbert Moot, being duly sworn, deposes and says that he has read the foregoing petition and knows the contents thereof, and the same is true of his own knowledge except as to the matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true.

Deponent further says that all the matters stated in said petition are within the personal knowledge of deponent.

ADELBERT MOOT.

Sworn to before me April 25 1903.

[Seal of Wm. H. Stanley, Notary Public, Erie County, N. Y.]

WM. H. STANLEY,
Notary Public in and for Erie Co., New York.

Supreme Court, Fourth Appellate Division.

In the Matter of the Application of SPENCER S. BULLIS for Discharge of Judgments.

Present: Adams, presiding justice; McLennan, Spring, Williams and Hiscock, associate justices.

Appeal from an order entered in the clerk's office of Cattaraugus county on the 3rd day of September, 1901, denying the motion made on behalf of Spencer S. Bullis for the discharge of record of judgments against him.

This proceeding was commenced by the petition of the appellant which shows that he has been discharged from his debts in compliance with the national bankrupt law; that more than one year has elapsed since such discharge; that two judgments recited in the petition are docketed against him, and the motion for their cancellation and discharge is made pursuant to section 1268 of the Code of Civil Procedure. The judgment creditor opposed the motion and the material facts contained in the record presented are set forth in the accompanying opinion.

C. S. Cary and Adelbert Moot for the appellant.

C. Walter Artz for the respondent.

SPRING, *J.*:

The petitioner upon this motion was adjudicated a bankrupt September 19th, 1900. There were two judgments entered against him in 1895, one of $3,586.40 and one of $341,745.65, and this motion was for the purpose of relieving the petitioner from the liability of these judgments. The judgment creditor contests the application on the ground that the judgments were recovered by reason of the fraud of the said Bullis and one Barse.

The question before us involves the construction of subdivisions 2 and 4, section 17, chapter 3 of the national bankrupt law of 1898. Section 17 so far as applicable provides:

"Debts not affected by a discharge.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for wilful and malicious injuries to the person or property of another; * * * (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The action in which the judgments were rendered was not one at law for fraud and deceit, but was a suit in equity, and in order to

appreciate the situation it becomes necessary to analyze the complaint and the decision of the court.

The allegations of the complaint with the exhibits attached show that on the 8th day of October, 1889, Spencer S. Bullis and Mills W. Barse owned the capital stock of three railroad companies, to wit, the Allegheny and Kinzua R. R. Co., a corporation organized under the laws of Pennsylvania, a New York corporation of like name, and the Bradford and Corydon R. R. Co., also a Pennsylvania corporation. These railroad lines were constructed for the purpose of reaching the timber on a large tract near the Allegany river. The combined length of the railroads at that time was sixteen miles, but the length contemplated with the radiating lines completed was thirty miles. Said Bullis and Barse also owned thirty thousand acres of timber land in McKean county, Pennsylvania, and also other tracts of timber land in that vicinity. They desired financial aid in the development of their scheme and on the date mentioned entered into a written agreement with I. B. Newcombe and Co., a firm of New York bankers, and this agreement is designated Schedule "A" of Exhibit "A."

By the terms of this agreement said Bullis and Barse were to execute a trust mortgage or deed to the Central Trust Company of New York, as trustee, as security for first mortgage bonds to the amount of $250,000. bearing interest at five per cent. and payable thirty years from date. The said mortgage was to cover the properties and franchises of said railroad corporations and also the said thirty thousand acres of land. All of said property was to be under the management of a new corporation capitalized at $250,000. The said bankers undertook to negotiate at par $210,000 of said bonds and to pay over the avails to said Bullis and Barse as the railroad was completed along in sections of five miles. The new corporation was to be managed by seven directors three of whom were to be elected by said bankers, so that Bullis and Barse were to retain a majority in the management of the company. There are various other provisions in the agreement, for instance as to an option given to the bankers to purchase all the capital stock of the corporation at a fixed price and that the real estate within the dominion of said corporation was to be "contiguous or tributary to one or the other of said several railroads and they shall be timbered and profitable to said corporation," and that the new corporation should be organized and the title transferred to it and the trust instrument executed and the bonds ready to be delivered on or before January 1st, 1890. A modification of said agreement was made by another contract entered into between the same parties on the 9th day of December, 1889. This agreement provided for the merger and consolidation of these railroads with a capital stock of $500,000. at par value and for the issue of a "first mortgage or deed of trust,"

upon all of the property of the corporation to said Central Trust Co. of New York, as trustee, for $500,000. to secure gold bonds to that amount. The scheme designed by the modified agreement was the extension of the railroad lines to seventy miles and the inclusion of 16,000 acres of additional timber land, thus bringing within the ownership of the new company 46,000 acres all told. By this agreement only $300,000 of the bonds issued were to be put upon the market at once, and they were to represent forty-six miles of completed railroad. Newcombe and Company undertook to dispose at par of $260,000 of this bond issue to be used as the road was completed and put in operation by sections of five miles, and in the manner set out at length in the second paragraph of the agreement. The time for the consummation of the agreement by the transfer of the title, etc., was by this contract extended to February 1st, 1890. Bullis and Barse were empowered to enter into a contract with the Interior Construction and Improvement Company for the purpose of causing the merger and consolidation of said several railroads and to cause the construction and completion thereof into one connected system. Two agreements were accordingly on the 9th day of December, 1889, entered into by said construction company, one with the Allegany and Kinzua Railroad Company, which was owned by Bullis and Barse, and one with them individually providing for the construction and consolidation of these railroads, and the contract outlined the manner in which the moneys arising from the bond issues were to be distributed, a large part of which was to be paid to Bullis and Barse, and also provided for the deposit of a certain amount with the trustees named.

The complaint further charges that said Bullis and Barse "falsely and fraudulently pretended and represented to said firm of I. B. Newcombe & Co." that said tract of 30,000 acres to be conveyed was free and clear from all incumbrances, that all of said land was contiguous or adjacent to the line of said railroad as the same was then constructed or surveyed and projected, and the said land was covered by a large quantity of merchantable timber capable of yielding and producing seventy tons of freight in timber, lumber and bark for each acre of land for transportation over said railroad. It is further alleged that in fulfillment of the said agreements the defendant railroad corporation on the 1st day of February, 1890, executed "its first mortgage or deed of trust" to said trust company conveying to it said railroad properties and franchises and providing for an issue of bonds limited to $500,000.00 to be secured by said properties and the forty-six thousand acres of timber land to be conveyed by said Bullis and Barse to said trustee. "That the defendants Bullis and Barse caused said Bullis and Sarah E., his wife, to join with said railroad company in said mortgage," and that by said mortgage they assumed to convey to said trustee land contigu-

ous to the line of said railroad and free from incumbrances and covered by a large quantity of merchantable timber, aggregating 30,954.10 acres, and which by the terms of the said agreements was to be a condition precedent to the issue of $300,000 of said bonds to be used in the building and completion of said forty-six miles of said railroad. That in reliance upon the conveyance of the said land bonds to the amount of $300,000 were issued and were sold by said Newcombe & Co., ten of which were purchased by the plaintiff in the action. That all of the proceeds of the said bonds have been used in the construction of said lines and in payment of prior liens upon the property and the said constituent lines, and that the defendant railroad company, which is the consolidated company, is wholly without funds, and that the extension thereof is essential to enable it to obtain money to meet its liabilities. That said Bullis and Barse refused to convey to said trustee the remaining 16,000 acres of such land and to provide for the building of the balance of said railroad whereby the construction company is unable to proceed with its work of completing the same.

The complaint further alleges that said 30,954.10 acres of land conveyed by Bullis and his wife were not free of incumbrances. That the same at that time were subject to prior liens aggregating $159,000 besides interest. That $144,776.07 of said indebtedness still remain unsatisfied. That said land was not covered with merchantable timber, but was waste land from which the salable timber had been removed, and that a large portion of the said land was not adjacent to the line of said railroad, and the timber thereon not accessible to be transported thereon. That a large portion of the land so assumed to be conveyed was not owned by either of the said defendants and was not conveyed at all by said deed. All of which facts the said Bullis and Barse "well knew at the time they made" said pretended conveyance, and said conveyance "is in reality false and fraudulent." That by reason of the "fraud and failure" of said Bullis and Barse to convey said land free of liens "a great fraud has been committed" by them which will cause irreparable injury to the bondholders, including the plaintiff, who is one of them, unless the performance of the said agreements and the conveyance of 30,000 acres of unencumbered timber land to said trustee are specifically decreed.

The complaint further charges many derelictions of duty by said Bullis and Barse as directors of the said railroad corporation and the diversion from their proper use "fraudulently and secretly" of steel rails and other properties belonging to said company, and they threaten further unlawful expenditures upon the credit and at the expense of the said company. That by reason of the unlawful acts of said Bullis and Barse the earning capacity of the company has

been seriously impaired. That pursuant to a provision in said trust conveyance providing for the release from the lien of the said mortgage of "any portion or portions of said timber land" upon payment of the value of the portions so released to be ascertained by arbitrators appointed as the said conveyance provided, arbitrators were appointed upon the request of Bullis and Barse and appraised over four thousand acres of said land at one dollar per acre. That it is apparent therefrom that said Bullis and Barse "had perpetrated a gross fraud" upon said railroad company and upon the bondholders as said land if timber land was of the value of $25 per acre. The complaint then asked for specific performance; "or that said defendants pay to said trustee, for the security of the bondholders, such a sum of money as the court shall ascertain to be equivalent to the value of said lands and real estate, conveyed as aforesaid, which are not in conformity with the terms of said several agreements and said bonds and the mortgage or deed of trust securing the same; and in addition thereto 16,000 acres of like timber land, in all respects similarly situated, and free from encumbrances, as security to authorize the issue of $200,000 of bonds, in said agreements specified and set apart for the construction of the twenty-four miles of railroad additional to the forty-six miles above mentioned."

The complaint, therefore, is one in equity demanding that the defendants comply with their several agreements and charging that the defendants in their attempted compliance therewith falsely and fraudulently foisted upon the trustee a conveyance which only apparently transferred the title to the large quantity of land described in it, and that this fictitious transfer was in pursuance of the fraudulent scheme on the part of the said defendants, and the complaint asked for money compensation in the event of the inability of the defendants to fulfill their undertakings.

A trial was had at a special term in New York county and at the close of the evidence it appeared that Bullis and Barse were unable to perform specifically and the court dismissed the complaint, declining to entertain jurisdiction for the purpose of awarding damages in lieu of strict performance. The judgment entered on this decision was reversed by the general term (80 Hun., 570), and upon an appeal taken by the defendant railroad company this judgment of reversal was affirmed by the court of appeals (151 N. Y., 372). A new trial was had in the meantime upon the answers interposed by Bullis and Barse before Mr. Justice Barrett, and elaborate and explicit findings of fact were made by him fully sustaining the charges contained in the complaint and upon which the allegations of fraud were based. The special term among other facts found that before the execution of the several agreements referred to that said Bullis and Barse pretended and represented to the said firm of I. B. Newcombe & Co. that the said 30,000 acres of land

were timbered, free and clear of all encumbrances, and contiguous and adjacent to the line of the defendant railroad company, as the same was then constructed and projected, and that said land was covered by a large quantity of merchantable timber which would be sufficient to and would actually provide said railroad with at least 70 tons of freight to the acre, for the conveyance over said railroad at rates from 25 to 50 cents per ton, in addition to the percen g e accruing to said defendant railroad company from divisions with other lines." Further that before said agreements were entered into at the request of Bullis and Barse, engineers were sent from New York to inspect the timber on the land to be conveyed to said trustee. That "they were escorted through certain timber lands" by said Bullis, and the lands through which they "were escorted by said Bullis were heavily timbered," and that said Bullis "stated that said lands were to be placed under said mortgage" to said trustee, and a report in accordance with this statement was made by said engineers, and upon this report said Newcombe & Co. "embarked in the enterprise and entered into said scheme of consolidation and extension." That said lands so "defined and pointed out by said Bullis were worth from eighteen to twenty dollars an acre." Again that said Bullis and Barse "had stated and represented to Newcombe & Company" that the mortgage was to be a first lien, the lands to be well timbered and "contiguous and tributary to said lines of railroad." That said trust mortgage was approved and accepted in the belief that said representations were true in fact and that Bullis and Barse were "in good faith performing their said covenants." The court further found:

"XCIII. That the statements and representations of said defendants Bullis and Barse with respect to said timber lands, mentioned and referred to in said Exhibits "A," "B," and "C" and Schedule "A" annexed to the complaint, were fraudulent and made with intent to deceive.

XCIV. That the plaintiff was in fact deceived by said statements and representations.

XCV. That said statements and representations were false and untrue.

XCVI. That said agreement was in fact fraudulently made with respect to the lands agreed to be conveyed by said Bullis and Barse." That a great part of the lands included in the deed were not the property of Bullis, and the value of that owned by him and not timbered was $13,350., while that apparently covered by the deed but not owned by him was worth $175,502.77, and a considerable part of that included in the conveyance was encumbered.

In the conclusions of law the court decides it has "jurisdiction to proceed in this cause by reason of the fraud practiced by the defendants Bullis and Barse in the premises;" and by the "fact that the

plaintiff has been deceived by the fraudulent statements and misrepresentations of the defendants." It directed "immediate specific performance" by them by their conveying to the trust company "30,000 acres of land free and clear of all incumbrances and contiguous and tributary to the lines of the railroad of the defendant * * * timbered and profitable to said defendant railroad company and of the market value of at least $18. per acre." Finally the court directs and decides: "That the defendants Spencer S. Bullis and Mills W. Barse, at once pay to the Central Trust Company of New York the sum of $292,125.00, with interest thereon at the rate of five per cent., per annum from the first day of February, 1892, for the *pro rata* benefit of the plaintiff, James R. O'Bierne, and all other holders of the first mortgage bonds of the defendant, The Allegany and Kinzua Railroad Company. The judgment entered upon this decision was affirmed. (2 App. Div., 545) (158 N. Y., 466.)

The action for specific performance in the strictest sense thereof was founded upon the actual positive fraud of the defendants Bullis and Barse. They had in fact in pretended compliance with their agreements conveyed to the designated trustee 30,000 acres of land. The plaintiff alleged that the defendants fraudulently included in this conveyance lands not owned by the grantors and that the bulk of the tract was not timber land, was encumbered and was not adjacent to the railroad lines described. Lands so located and with heavy growing timber had been shown to the engineers selected to inspect it and a conveyance to a trustee of the lands represented was sought by the action. The gist, the intrinsic ingredient of the action was consequently the fraudulent scheme, the false representations of these defendants. As was said by the court of appeals in its first review of the case (151 N. Y., at page 384); "The theory of the complaint and the tendency of the proof upon the trial were that a fraudulent scheme was devised by Bullis and Barse."

Jurisdiction was held to exist in the court of equity to award damages in lieu of decreeing specific performance in case the proof disclosed the inability to enforce a precise compliance with the agreements. When it developed upon the second trial that specific performance was unavailing the trial court retained jurisdiction to proceed "by reason of the fraud practiced by the defendants Bullis and Barse." The backbone of the action, whether viewed strictly as one in equity or for damages in lieu of equitable relief to compensate the bondholders for the misconduct of the defendants was the fraud of the latter.

As we interpret subdivision 2, of section 17 of the bankrupt law it does not limit the exception to common law actions of fraud or deceit. The gist and gravamen of the action must have been the positive and intentional fraud of the bankrupt. The record presented must clearly show that such misconduct was the pith of the

action, and it may not be dependent upon oral proof or other evidence outside of the record. There are many authorities construing the kindred sections of the bankrupt law of 1867, which provided "that no debt created by the fraud or embezzlement of the bankrupt * * * shall be discharged under this act."

In Strang *vs.* Bradner, 114 U. S., 555, the discharge in bankruptcy was interposed to an action charging false and fraudulent representations made by one member of a co-partnership which included the defendants, who were not cognizant of the representations made. The court held that the fraud of the co-partner was imputable to the other members of the firm, and in defining the fraud which was within the purview of the section quoted decided that it "should be construed to mean positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, and not implied fraud or fraud in law, which may exist without the imputation of bad faith or immorality."

The same principle was reiterated and the authorities analyzed in Forsyth *vs.* Vehmeyer, 177 U. S., 177, and the court at page 182 thus defines the representations which constitute a fraud: "A representation as to a fact made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud, involving moral turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent." In the authorities which I have examined no stress is laid upon the form of the action. While an action of fraud to the mind of a lawyer signifies the common law action of fraud or deceit, the wording of the subdivision under discussion evidently was not framed with that precise remedy in view. The expression "judgments in actions for frauds" conveys no such signification as that mentioned, and may include any positive intentional fraud which was the basis of a judgment and was of the substance of the recovery. The statute is to be construed liberally to discharge the insolvent from the burden of the obligations which he is unable to pay in full, but that liberality may not be extended to an insolvent to release him from a judgment which was recovered against him by reason of his "positive fraud and intentional wrong," whatever may have been the form of the action in which the recovery was had. The primary purpose of the statute is to enable an insolvent debtor to be relieved from the burden of his obligations. One exception that has pervaded all of our bankrupt laws is that where the insolvent has become liable for the payment of a debt which had its origin in his own positive dishonesty, the way is not open for his discharge from that liability. In one instance proof that the debt was created by fraud was sufficient to raise the barrier. In another the debt must

have ripened into judgment, but in each case the fraudulent misconduct is the basis of the prohibition, not the technical form which the indebtedness has assumed.

As was said in Collier on Bankruptcy (3rd ed.) at page 197: "The fact that the judgment was in an action for fraud, or wilful*l* or malicious injury may, perhaps, not appear by the judgment itself. That is not necessary; it is sufficient if it appear from the record of the case. If the record show that the action was for any of the causes specified, then the judgment is not barred by a discharge. The action must have been based on the fraud or the wilful*l* or malicious injury. It is not enough that there may have been incidental ori mmaterial, false and fraudulent representations in connection with the transaction, if the action is not based on them." And also at page 202: "The debt as we have seen under subdivision 2, is not released by a discharge, although in the form of a judgment. But the record must show that the debt is so created. If a judgment is rendered in an action, the record of which shows material, traversable allegations of fraud which were necessarily determined, then the judgment is conclusive." In matter of Lewensohn, 99 Fed. Rep., 73, Justice Brown says: "In cases of this kind no purely technical considerations as to the precise form of the action should be regarded."

In Burnham *vs.* Pidcock, 58 App. Div., 273, the action in which the judgment was recovered was for conversion. Neither the judgment nor anything in the record showed that fraud or fraudulent representations were an essential element of the cause of action, although the court in its opinion stated the act which constituted the conversion was fraudulent. The court held that the nature of the action must be gathered from the record instead of from any extrinsic source. The court uses this language at page 275: "The judgments which are excepted from the effect of a discharge in bankruptcy are, as it is expressed in the statute, judgments for fraud. The phrase means that the fraud is the gravamen of the action in which the judgment is recovered, and that proof of the fraud is essential to the right of recovery. It does not include a judgment in which the right of recovery is based upon an act which is not essentially fraudulent, although in that action fraud may be incidentally shown." That case is not an authority which is helpful to the appellant. In the present case the record shows that fraud was the marrow of the cause of action and the sole ground for retaining jurisdiction and awarding damages was the fraudulent conduct of Bullis and Barse.

No resort need be had to extraneous proof to show that fraud was not an incident, but the vital factor in the action. The findings of fact passed upon by the trial judge are minute and circumstantial, and abound in facts from which the turpitude and deceit of the de-

fendants are established. These findings are supplemented by conclusions of law and the whole followed by the formal judgment which bears the signature of the justice presiding, so that the record consists of the decision and judgment made by the justice himself and forming one complete document. We think the respondent is not concluded because he elected to proceed by suit in equity. He did not base his cause simply upon breach of contract, but on the fraud of Bullis and Barse, and emphasis is given to that element in the various appeals. The court in its opinion in 80 Hun. say at page 573: "That the facts found * * * conclusively show that Spencer S. Bullis and Mills W. Barse perpetrated an atrocious fraud." The court of appeals (158 N. Y., 466), in discussing its previous decision observes at page 468: "The theory upon which the decision proceeded was that they devised a fraudulent scheme for the consolidation of certain railroads owned and controlled by them, issued bonds upon false representations as to the timber lands to be furnished as added security under the mortgage to make the bonds secure and salable, that upon those facts the court would have been justified in granting relief to the plaintiff against them." With the fraud of the petitioner so marked a constituent in the record of which the judgment is a part we are constrained to hold that he is not entitled to the cancellation of the judgment as it is within the prohibition of subdivision 2 of section 17 referred to.

The counsel for the respondent devotes much space in his brief to an argument that subdivision 4 of section 17 applies to this appeal. The position is that the terms "fraud, embezzlement, misappropriation" in that subdivision relate to an individual while the word "defalcation" alone applies to one "acting as an officer or in a fiduciary capacity." We cannot assent to that construction. In the corresponding section (33) of the act of 1867, the interpretation contended for may have been tenable. In the present section, however, the exceptions have been remodeled and reclassified, and the intention apparently was to make subdivision 2 applicable to frauds, etc., perpetrated by an individual failing debtor, but protected him by limiting the prohibition against his discharge to frauds, false representations, etc., embodied in a judgment and provable by the record. Subdivision 4 was then designed to relate to an officer or one acting in a trust capacity, and was enlarged in its scope by erecting a barrier to the discharge of such a culpable debtor who had been guilty of "fraud, embezzlement, misappropriation," as well as "defalcation." A person faithless in a public or trust capacity is the more flagrant malefactor, and hence it may have been deemed advisable to extend the barrier to his receiving the benefit of a discharge permitted by the statute to include the other delinquencies named. The natural rendition of subdivision 4 as well as its grammatical construction seems to favor this interpretation. If any debt created

by fraud, embezzlement or misappropriation is to be excepted from the application of the statute then there is no necessity of subdivision 2 making a judgment essential to prevent the granting of the discharge under the statute. The bare proving the debt was created by fraud would be sufficient to raise a bar to the release of the insolvent therefrom, which would be tantamount to emasculating subdivision 2. We conclude, however, that the petitioner is barred by subdivision 2 from obtaining the cancellation of the judgments and that the order of the special term should therefore be affirmed with ten dollars costs.

The order is affirmed with ten dollars costs and the disbursements of this appeal.

All concur.

UNITED STATES OF AMERICA:

Supreme Court.

In the Matter of the Application of SPENCER S. BULLIS for a Discharge of Certain Judgments.

The said Spencer S. Bullis, by Adelbert Moot, Esq., his attorney, now comes into the Supreme Court of the United States and for assignment of errors herein says:

That in the records and proceedings and in the final judgment in said matter there is manifest error in this, to wit:

1st. That the supreme court of the State of New York and the appellate division thereof, and the court of appeals of the State of New York, in making and rendering their decision, order or judgment, in and by which said courts decided and adjudged that your petitioner Spencer S. Bullis was and is not entitled to an order or judgment directing the cancellation of the judgments heretofore rendered against your petitioner and Mills W. Barse, in favor of James R. O'Beirne for the sum of three thousand five hundred and eighty-six dollars and forty cents ($3,586.40) on the 29th day of June, 1895, and the judgment in favor of the Central Trust Company of New York against your petitioner and Mills W. Barse for three hundred and forty-one thousand seven hundred forty-five dollars and sixty-five cents ($341,745.65) on the same day, and adjudging that your petitioner pay to said judgment creditors the sum of one hundred and forty-three dollars and seventy-one cents ($143.71) costs, and in refusing to give full force and effect to the discharge in bankruptcy heretofore granted to your petitioner on the 19th day of September, 1899, erred and called in question the validity of the act of Congress of the United States, entitled "An act

to establish a uniform system of bankruptcy throughout the United States," approved July 1st, 1898, and did by their said decision and judgment call and draw in question the authority exercised under said act by said United States court, and did also draw in question the provisions of article I, section 8, sub-division 4, of the Constitution of the United States, giving to Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States, and deny to the petitioner the full force and benefit of the bankruptcy act of Congress passed as aforesaid, whereas by the law of the land judgment should have been rendered by said courts of the State of New York directing the cancellation and discharge of said judgments as against the petitioner Spencer S. Bullis.

And for these and other errors in the record and proceedings, and the matters herein set forth, your petitioner Spencer S. Bullis, prays that the judgments or orders in favor of said James R. O'Beirne and Central Trust Company of New York, may be reversed and held for nothing, and that your petitioner Spencer S. Bullis may be restored to all things he may have lost by occasion of said judgment or order.

Dated Buffalo, April 25 1903.

ADELBERT MOOT,
Attorney for Spencer S. Bullis.

[Endorsed:] United States Supreme Court. In the matter of the application of Spencer S. Bullis for the discharge of certain judgments. Original. Petition for writ of error & assignment of errors. Moot, Sprague, Brownell & Marcy, attorneys for petitioner Office and P. O. address, 45 Erie County Savings Bank building, Buffalo, N. Y.

UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the honorable the judges of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, on a remittitur from the court of appeals of the State of New York, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit entitled in the matter of the application of Spencer S. Bullis for discharge of judgments of record, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exer-

cised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Spencer S. Bullis as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 18th day of May, in the year of our Lord one thousand nine hundred and three.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States In the matter of the application of Spencer S. Bullis for the discharge of certain judgments Original. Writ of error Moot, Sprague, Brownell & Marcy, attorneys for petitioner Office and P. O. address, 45 Erie County Savings Bank building, Buffalo, N. Y.

UNITED STATES OF AMERICA, *ss:*

To James R. O'Beirne, on behalf of himself and all other bondholders of the Allegheny & Kinzua Railroad Company, and The Central Trust Company of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States at Washington, within thirty

days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, wherein Spencer S. Bullis is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 18th day of May, in the year of our Lord one thousand nine hundred and three.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

[Endorsed:] Supreme Court of the United States. In the matter of the application of Spencer S. Bullis for the discharge of certain judgments. Original. Citation. Moot, Sprague, Brownell & Marcy, attorneys for petitioner. Office and P. O. address, 45 Erie County Savings Bank building, Buffalo, N. Y. Due and personal service of a copy of the within citation is hereby admitted this 12th day of June, 1903. Frank Sullivan Smith, attorney for James R. O'Beirne &c. Adrian H. Joline, att'y for the Central Trust Co. of N. Y.

(Copy.)

Know all men by these presents: That the Lawyers' Surety Company of New York having an office and principal place of business at Nos. 32, 34, and 36 Liberty street, in the city of New York, is held and firmly bound unto James R. O'Beirne on behalf of himself and all other bond holders of the Allegheny & Kinzua Railroad Company, in the full and just sum of five hundred ($500) dollars to be paid to the said James R. O'Beirne on behalf of himself and all other bond holders of the Allegheny & Kinzua Railroad Company, his certain attorney, executors, administrators or assigns, to which payment well and truly to be made the said surety company binds itself, its successors and assigns jointly and severally by these presents.

Sealed with our seals and dated this 13th day of May, 1903, in the year of our Lord one thousand nine hundred and three.

Whereas lately at a session of the court of appeals of the State of New York in a proceeding depending in said court entitled "In the matter of the application of Spencer S. Bullis for discharge of judgments of record," a decision was rendered against the said Spencer S. Bullis, and affirming the judgment of the supreme court of said State denying said application and the said Spencer S. Bullis having obtained a writ of error and filed a copy thereof in the clerk's office

of the said court to reverse the decision in the aforesaid suit and a citation directed to the said James R. O'Beirne on behalf of himself and all other bondholders of the Allegheny & Kinzua Railroad Company, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington within thirty (30) days from the date thereof:

Now therefore the condition of the above obligation is such that if the said Spencer S. Bullis shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

[SEAL.] THE LAWYERS' SURETY COMPANY
OF NEW YORK,
By EDWARD C. HARD, *Attorney.*

Approved:
MOOT, SPRAGUE, BROWNELL & MARCY, *Counsel.*

Approved by:
R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Form No. 244.

STATE OF NEW YORK, }
County of Erie, City of Buffalo, } ss:

On this 13th day of May 1903, before me personally came Edward C. Hard, the attorney of the Lawyers' Surety Company of New York, known to me to be the individual described in and who as said attorney executed the foregoing instrument and acknowledged that he executed the same as the act and deed of the Lawyers' Surety Company of New York therein described and for the purpose therein mentioned by virtue of the power of attorney duly executed by the said The Lawyers' Surety Company of New York, bearing date the seventh day of November in the year 1901, and recorded in the office of the clerk of the county of Erie on the 12th day of November, 1901, in Liber 8 of Powers of Attorney, at page 134, and also recorded in the office of the clerk of the county of Niagara on the 15th day of November, 1901, in Liber 15 of Miscellaneous Records at page 553.

And the said Edward C. Hard, being by me duly sworn says that he resides in the city of Buffalo, that he is the true and lawful attorney of the Lawyers' Surety Company of New York, for it and in its name and stead to execute any and all bonds, undertakings and agreements of suretyship in the county of Erie, and the county of

Niagara, in the State of New York; that he knows the corporate seal of said company, that the seal affixed to the foregoing document is such corporate seal, that it was affixed by order of the board of directors of said company, and that he signed said instrument as attorney, as aforesaid, of said company by like authority, and the said Edward C. Hard, further says that he is acquainted with the firm of Moot, Sprague, Brownell & Marcy, and knows the said firm to be the counsel of said company in the said county of Erie, and the county of Niagara; that the signature of the said firm of Moot, Sprague, Brownell & Marcy subscribed to the said instrument is in the genuine handwriting of the said firm of Moot, Sprague, Brownell & Marcy and was thereto subscribed by the like order of the said board of directors and in the presence of him the said Edward C. Hard, attorney.

CYESTA HORNBECK,
Notary Public in & for Erie Co., N. Y.

At a stated meeting of the executive committee of the Lawyers' Surety Company of New York, held at the office of the company, Nos. 32, 34 and 36 Liberty street, in the city of New York, on the 7th day of November, 1901, on motion duly seconded, the following resolution was adopted:

Resolved, That the president and secretary be, and they hereby are, authorized to execute the following power of attorney in favor of Edward C. Hard.

Know all men by these presents, that the Lawyers' Surety Company of New York, a corporation duly organized under the laws of the State of New York to transact a fidelity and surety business, does hereby constitute and appoint Edward C. Hard, of the city of Buffalo, county of Erie, in the State of New York, its true and lawful attorney for it, and in its name and stead, to execute and deliver any and all bonds, undertakings and agreements of suretyship which it is authorized to make or enter into by its charter, within the county of Erie and the county of Niagara, in the State of New York, but no such bond, undertaking or agreement of suretyship shall be valid and binding upon it, unless and until approved by the signature of Moot, Sprague, Brownell & Marcy, its counsel in and for the said county of Erie and the county of Niagara, signed thereon by some member of the firm.

The form for the execution of such bonds, undertakings and agreements of suretyship shall be substantially as follows:

THE LAWYERS' SURETY COMPANY OF NEW YORK,
By EDWARD C. HARD, *Attorney.*

Approved by
MOOT, SPRAGUE, BROWNELL & MARCY, *Counsel.*

Hereby granting unto said attorney full power and authority to act in and concerning the premises as fully and effectually as it might do if personally present.

In witness whereof the said corporation has caused its corporate seal to be hereto affixed and these presents to be signed in its name and behalf by Joel B. Erhardt, its president, and Joel Rathbone, its secretary, this 7th day of November, 1901.

THE LAWYERS' SURETY COMPANY OF NEW YORK,
[SEAL.] By JOEL B. ERHARDT, *President.*
Attest: JOEL RATHBONE, *Secretary.*

Signed and sealed in presence of:
H. G. HINTON.

COUNTY OF NEW YORK, *ss:*

I, Louis E. Kuster, acting secretary of the Lawyers' Surety Company of New York, having compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, do hereby certify that the same is a true and correct transcript therefrom, and the whole of said original resolution.

Given under my hand and the seal of the company at the city of New York, this 1st day of April 1903.

LOUIS E. KUSTER,
Acting Secretary.

STATE OF NEW YORK, *County of Cattaraugus,* } *ss:*

I, E. E. Kelley, clerk of said county, and of the courts thereof, do hereby certify that I have compared the foregoing copy of undertaking with the original filed in this office June 15th 1903 and now remaining herein, and that said copy is a true transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of said county at Little Valley, this 15th day of June 1903.

[Seal Cattaraugus County, New York. Incorporated March 11, ——.]

F. M. MERRILL, *Dep. Clerk.*

[Endorsed:] Supreme Court of U. S. In the matter of the application of Spencer S. Bullis for discharge of judgments of record. Undertaking.

STATE OF NEW YORK:

Supreme Court, Cattaraugus County.

In the Matter of the Application of SPENCER S. BULLIS for the Discharge of Certain Judgments.

It is hereby stipulated and agreed by and between the respective parties herein, that the annexed and foregoing is a true and correct copy of the record and all proceedings had and entered in the above entitled cause by said court, including the written decision and reasons therefor duly filed herein, which appears of record and on file in said cause, and that the same is a true transcript therefrom and of the whole thereof; that attached thereto are the writ of error, with allowance endorsed thereon, citation, a copy of the bond to the adverse party filed with the writ of error, the petition for a writ of error, and the assignment of errors in the Supreme Court of the United States.

Dated June 12, 1903.

FRANK SULLIVAN SMITH,
Attorney for James R. O'Beirne, in Behalf of Himself, etc., Defendant in Error.
ADRIAN H. JOLINE,
Attorney for The Central Trust Company of New York, Defendant in Error.
ADELBERT MOOT,
Attorney for Spencer S. Bullis, Plaintiff in Error.

Endorsed on cover: File No. 18976. New York supreme court. Term No. 325. Spencer S. Bullis, plaintiff in error, *vs.* James R. O'Beirne, on behalf of himself and all other bondholders of the Allegheny & Kinzua Railroad Company, and The Central Trust Company of New York. Filed June 18, 1903.

Supreme Court of the United States

SPENCER S. BULLIS,
Plaintiff in Error,

AGAINST

JAMES R. O'BEIRNE *et al*,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF OF MR. CARY AND MR. MOOT, OF COUNSEL FOR BULLIS, PLAINTIFF IN ERROR

STATEMENT.

Spencer S. Bullis, plaintiff in error, applied to the Special Term of the Supreme Court of New York State, at Buffalo, in July, 1901, pursuant to the Code, Section 1268, to be discharged from a judgment of the Supreme Court of the State of New York, because said Bullis had been adjudicated a bankrupt September 19, 1900. The judgment creditors, who are defendants in error, resisted his discharge, because it was claimed

their judgment against Bullis was for fraud, and, therefore, excepted from the operation of the Bankrupt Act. The New York Court sustained this position, and denied the application "upon the merits." Upon appeal, the Appellate Division, Fourth Department, affirmed this decision, upon the opinion of Spring, J. (p. 218).

Mr. Bullis appealed to the Court of Appeals from the final order denying his application, but that Court affirmed the order without any opinion (p. 209).

ERRORS ASSIGNED.

The errors upon which writ of error of this Court rests are, that the New York Courts refused to give full force and effect to a decree of the Federal Courts, in that they refused to give such effect to a discharge in bankruptcy under the Bankrupt Act of 1898; also that thereby there was called in question the United States Constitution giving Congress the power to make uniform bankrupt laws, and the Bankrupt Act of 1898 thereunder.

QUESTIONS HERE.

The questions that come before this Court are those that arise in the construction of subdivision 2 and subdivision 4 of Section 17 of the Bankrupt Act. Section 17, containing these subdivisions, reads as follows:

> "Sec. 17. DEBTS NOT AFFECTED BY A DISCHARGE.—A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as (1) are due as a tax levied by the United States, the State, County, district, or municipality in which he resides; (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another;

(3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; *or* (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

Was the judgment obtained against Bullis obtained "in actions for frauds, or obtaining property by false pretenses or false representations?"

Our position is that the complaint in the action in which the judgment was rendered shows that action was an action on contract, or *ex contractu*, and Bullis is entitled to have the judgment discharged. If the action was one *ex delicto* he is not entitled to be discharged from it.

There is some ground for arguing that, if the bankrupt law was the same as it was under the Act of 1867, Bullis would not be entitled to a discharge. The present Bankrupt Act, however, is so changed that if a party elects to bring his action on contract, and thus waives the fraud or tort, and accordingly brings his action in such form that the fraud or tort is a mere incident to it, and the action really rests upon contract, expressed or implied, the resulting judgment is subject to discharge under the Bankrupt Act. This is as it should be, for a discharge should not be denied in such cases.

As we shall see, the facts in this case clearly show that the action in which the judgment was obtained was an action to specifically enforce a series of contracts. The Court expressly found plaintiff entitled to judgment enforcing the contracts. The Court awarded judgment of specific performance requiring many thousands of acres of timber lands to be immediately subjected to the lien of a railroad trust mortgage (p. 159.

fol. 634). Judgment was also awarded for $341,745.65, as alternative relief in the equity suit to specifically enforce the contracts (p. 161). The land was not immediately subjected to the railroad trust mortgage by either Bullis or Barse, and so judgment was entered against each for its money value and costs. *That judgment rests upon contract in an action on contract.* As that judgment was affirmed by our Courts, it stands of record against them. Bullis, having since been discharged under the present Bankrupt Act, now seeks to have the judgment discharged of record, pursuant to law.

The Court at the Appellate Division seems not to have kept the distinction between the Act of 1867 and that of 1898 clearly in mind. For instance, it was there said:

> "The statute is to be construed liberally * * * * but that liberality may not be extended to an insolvent to release him from a judgment which was recovered against him by reason of his 'positive fraud and intentional wrong,' "*whatever may have been the form of the action* in which the recovery was had" (p. 225).

The Court here rests its decision upon this Court's words under the Act of 1867?

FACTS.

The judgment roll in O'Beirne vs. Bullis begins at page 1 and continues to page 176. It contains the complaint and the contracts and exhibits upon which it rests. (pp. 1 to 107.) The answers of the various defendants appear (pp. 108 to 119.) The findings of the Court appear (pp. 119 to 160.) The judgment is an equitable one that could not be entered in an action for fraud, deceit, or misappropriating money. It was

entered against two of the defendants in favor of a third defendant appears (pp. 160-161.) This would be impossible in actions for fraud, deceit or misappropriation. The various notices of appeal and judgments of affirmance appear (pp. 162 to 176.) The thousands of pages of testimony upon which the findings were made, and upon which the various appeals turn, are not essential, were not used in the Court below, and are not disclosed in this record.

The first five paragraphs and nine pages of the complaint show, in substance, that Bullis and Barse agreed to mortgage 24 miles of railroad in Pennsylvania and New York, and 30,000 acres of timber land to raise the money to increase the 24 miles of railroad to 46 miles of railroad; also that they agreed to mortgage 16,000 acres of additional timber land to raise additional money to ultimately increase the railroad to a railroad of 70 miles. This mortgage was to secure the payment of $500,000 in bonds, and these bonds were to be sold by Newcombe & Co. to raise the money to build the additional 46 miles of railroad and put rolling stock upon it. This railroad was near Bradford, and was to make its income from hauling timber from the lands mortgaged and lands adjacent thereto. The railroad company was to have a capital stock of $500,000, of which Bullis and Barse were to have $265,000 and Newcombe & Co. $235,000.

The complaint then shows that Bullis and Barse undertook to mortgage the 30,000 acres of land so as to extend the railroad 46 miles, as first provided for, but the charge of the complaint is:

> "Said defendant and each of them falsely and fraudulently pretended and represented to said firm of I. B. Newcombe & Co." (that the land) "was free and clear from all incumbrance, etc" (p. 9, fol. 34).

It will be noted that there is no allegation here that the defendants knowingly or intentionally made these representations. The first contract made is made part of the complaint, and shows there was no intentional fraud, for it reads:

> "The parties (Bullis and Barse) are also the owners of, or control, 30,000 acres of land on which are extensive and valuable tracts of timber." (p. 36, fol. 143).

The complaint then shows that a mortgage was executed upon 30,954.19 acres of land and accepted by the Central Trust Company, of New York, as mortgagee, because Newcombe & Co. and the Trust Company relied upon "the good faith" of Bullis and Barse and "the validity of said apparent conveyance." (Pp. 10 and 11, especially fols. 44 and 45).

The complaint charges that this mortgage was only a "partial performance" of such contracts; that said lands "as to some part thereof," not specified, were owned by others; that the "greater part" were encumbered; that "a large portion * * * * was not timber land;" that "a large portion * * * * is not contingent or adjacent to the line of said railroad" (pp. 13-14, fols. 52, 53, 54, 55 and 56). The main claim was "the failure of the title to a portion of said 30,954.19 acres" (p. 15, fol. 58). The complaint here asks that Bullis and Barse be made to "specifically perform their said undertakings" (p. 15, fol. 59).

The complaint further alleges that $300,000 of the bonds of the company were sold by Newcombe & Co., and were purchased by the plaintiff, "relying upon the said several agreements hereinbefore mentioned" (p. 12, fol 46).

The complaint then clearly shows that Bullis and Barse did not profit by the transaction personally, or convert, or misappropriate money, because it alleges:

"And plaintiff further shows that the proceeds of all of said $300,000 have been expended in the construction of said extensions of said railroad, and in the payment of prior liens and incumbrances upon the property." (P. 12, fol. 47.)

The complaint then shows that the Railroad Company, and a construction company, have no funds to build more railroad, and Bullis and Barse "have refused to comply with the provisions of said several agreements and to place said timber land under the lien of said mortgage." (Pp. 12 and 13, fols. 48 and 50.)

The action was an election to stand on contracts and waive an action for fraud, for it is alleged:

"A great fraud has been committed by said defendants, Bullis and Barse, upon the holders of such outstanding bonds * * * * *unless said defendants, Bullis and Barse, be decreed by this Court to specifically perform their said undertakings and agreements* in that behalf and make good the same by the immediate conveyance * * * * to-wit: 30,000 acres of unincumbered timber land to said Trustee, in accordance with their said undertakings and agreements." (P. 15, fols. 58 to 60).

Would not such a performance in land or money end any charge of fraud? If so, a judgment for such performance by an immediate putting of the timber land under the mortgage, or for its value in money, would be a judgment in equity upon contract.

From this point allegations follow as to the effect of these transactions on the railroad, its credit and its shippers. The allegations go further and show that Bullis and Barse were causing the railroad to construct lines not authorized by the agreements, and threatened to construct still others through the Railroad Company. (Pp. 16, 17 and 18, fols. 64 to 71).

Many of the additional allegations are allegations as to the effect of such transactions upon the Railroad Company, which is alleged to have been controlled by Bullis and Barse (pp. 18 to 22).

The plaintiff showed that he tried to have the Trust Company bring an action in the premises and it refused, and thereupon he brings a class action in equity for himself and his co-bondholders. (Pp. 25-26, fols. 99 to 104).

The demand for the complaint is:

> "Wherefore, plaintiff demands judgment that immediate specific performance * * * * of their said agreements to convey" (be decreed) "or that said defendants pay to *said Trustee, for the security of said bondholders*, such a sum of money as the Court shall ascertain to be the equivalent of the value of said lands." (Pp. 26-27, fols. 104-105).

The contracts of which specific performance was sought are annexed to the complaint as a part of it, and appear from page 30 to page 53. The mortgage is annexed to the complaint as an exhibit and a part of it (pp. 53 to 104). The bond secured by the mortgage is set out as a part of the mortgage (pp. 57 to 61, fols. 227 to 244).

The mortgage reserved to Bullis and his assigns "all lumber, timber, wood, and bark, * * * * oil, * * * * coal, or other minerals." (Pp. 76-77, fols. 304 to 307.)

The complaint did not allege scienter.

There is no allegation that the contracts were entered into with a wrongful *intent*. The recital in the contracts that Bullis and Barse were the *"owners of, or controlled"* 30,000 acres of timber land, in McKean County, Pa., without describing it, is the best possible

evidence set forth in the complaint itself, and not disputed in the complaint, that the contracts were innocent. It is not alleged that it was not then stated that all this land was timber land, but only that it was land "on which are extensive and valuable tracts of timber" (p. 36, fol. 143). The Court found Bullis informed them he did not own some of the "reservations" covered by the mortgage (pp. 146-147, fol. 586). And in the very mortgage executed by Bullis in such "partial" performance, which mortgage is set forth as an exhibit to the complaint, there is a reservation to Bullis "until default by said Railroad Company" of "all lumber, timber, wood, bark, with the right * * * * to enter upon said lands * * * * at any time, for the purpose of cutting down, removing and taking away any and all trees, timber, lumber, wood, and bark, and * * * * all oil, petroleum, gas, coal, or minerals" (p. 77, fol. 305). No "default" had occurred when the Wall Street parties brought their suit for specific performance (p. 156, fol. 622).

With such contracts, and such a mortgage, alleged, in an action to enforce the contracts, insofar as the mortgage was not a fulfillment thereof, is it not apparent a judgment was sought upon contract, and that the fraud pleaded was only incidental to the action?

The position of the defendants in their answers was that the mortgage in question was an honest performance of the contracts (pp. 108 to 118).

The Court found the organization of the railroad, and making of the contracts and the mortgage, the issuance of the bonds and their sale, and the issuance of the stock in the railroad (pp. 119 to 134).

The Court expressly found that the mortgage was made "in apparent and partial performance of the undertakings and contracts" (p. 132, fol. 528).

The Court found that I. B. Newcombe & Co. caused their engineers to examine the lands that were mortgaged before the mortgage was made (pp. 134 and 135, especially fol. 534).

The Court found that the proceeds of the bonds were "duly and *fully* applied to the extinguishment of liens and the construction of the defendants' railroad lines," *although it finds that the proceeds used to extinguish the liens were paid over to Bullis and Barse for that purpose.* (P. 137, fols. 545-546.)

Newcombe & Co. only sold "$260,000 of bonds." (Findings p. 136, fol. 544.) The remaining $40,000 of the $300,000 went to Newcombe & Co., with $100,000 stock for making this sale (p. 51, fol. 201).

From this it is perfectly apparent that Bullis and Barse did not individually commit a deceit or fraud. Newcombe & Co., not Bullis and Barse, were profiting by this deal. The Court found the "plan embraced in the several contracts" was "formulated" by the Wall Street parties, Bullis and Barse consenting thereto (p. 152, fol. 606).

There is an express finding

> "that 1,900 acres thereof * * * * constitute a compliance with the covenants and agreements." (P. 143, fol. 572.)

Other findings show many thousands of acres also were timbered in whole or in part, were owned by Bullis, and wholly, or partially, complied with the contracts (see pp. 141-142-143, and 147-148-149-150-151-152).

The Court expressly finds correspondence from which it appears that Bullis informed them at the time that he did "not own" (some of) "the reservations" covered by the mortgage (pp. 146-147, especially fol. 586). The very contracts alleged in the complaint as the basis of the action, it will be remembered, recite that Bullis and Barse "are also the owners of, *or control*, 30,000

acres of land" (not described) "on which are extensive and valuable tracts of timber" (not all timber land). (P. 36, fol. 143.)

The finding of the Court shows that Bullis was rendered insolvent by these transactions and litigations (p. 145, fol. 580).

The Court found that it was impossible for the defendants to further perform their agreements (p. 157, fol. 625).

The conclusion of the Court was:

> "That the plaintiff has a right to enforce said scheme or agreement and maintain this action for the benefit of himself and all other bondholders" (p. 157, fol. 627).

The Court further determined:

> "I find that the plaintiff is entitled to judgment * * * * for the immediate specific performance by them, the said Bullis and Barse, of their contracts* * * * and that they conveyed, or cause to be conveyed, to said Trust Company for that purpose, 30,000 acres of land, free and clear" (p. 159, fols. 634-635-636).

If defendants did not do this, they were to pay the money at the rate of $18 an acre, instead thereof (pp. 159-160, fols. 636-637).

The judgment entered upon this and other conclusions of law was

> "that said defendants" (Bullis and Barse) pay to the defendant, Central Trust Company of New York, $341,745.65, "for the equal pro rata benefit of the plaintiff and all other holders of the first mortgage bonds." (P. 161, fol. 642.)

Does this statement of facts show an action for fraud or misappropriation? Upon the various appeals, the

New York Courts did not think so, but took an entirely different view of the matter.

THE LAW.

I.

The action against Bullis was upon contract, and not an action for fraud or misappropriation, and, therefore, the discharge in bankruptcy entitles Bullis to have the judgment discharged of record on this application.

In the litigation resulting in the judgment, the New York Courts clearly apprehended and stated, in substance, that the case was one brought for the specific performance of contracts.

The Court awarded a new trial because it held:

> "It has been held in many cases brought to compel the specific performance of contracts that damage may be awarded the plaintiff though specific performance be refused." (Opinion 80 Hun., p. 576. Statements of facts p. 570.)

Upon appeal from that decision the Court of Appeals said:

> "The plaintiff has set forth in his complaint *all the facts constituting a cause of action for specific performance*, and upon it appearing that, that relief could not be granted, he had, at least, the right to a new trial wherein he might establish his claim for *damages sustained by a breach of the covenants and agreements relied upon*" (Opinion 151 N. Y., p. 383).

The defendants, Bullis and Barse, took a new trial instead of appealing. At the beginning of that trial their counsel demanded a jury trial. His theory was that, if there was any cause of action stated, it was a cause of action for fraud, or on contract for damages, and they had a constitutional right to a trial by jury.

This demand was refused, and an exception was taken. This exception was fatal if the action was one for fraud, deceit or misappropriation, but if the action was one on contract for specific performance this exception had no virtue. The question of whether the action was one in fraud for deceit, or an action at law for tort of any kind, like misappropriating moneys, was, therefore, squarely raised. If the complaint presented such an action for the consideration of the Court, a jury trial was a constitutional right. On the other hand, if the cause of action was on contract for specific performance, and the frauds alleged were merely incident to that action, then the Court could properly deny a jury trial, and try it in equity without a jury.

Upon this point the Appellate Division said:

> "We think, therefore, regard being had to the pleadings, that the relief demanded by the plaintiff was purely equitable, and that the refusal to comply, at that stage of the case, with the formal demand for a jury trial, was right."
>
> (2 App. Div., pp. 548-549).

The opinion then proceeds to show that the action was one that could be maintained by a bondholder in equity, for himself and other bondholders. Of course it will be conceded at once that a bondholder cannot maintain such an action at law for damages by deceit or for misappropriating money. A single bondholder cannot maintain a single action for fraud for damages for all bondholders. Each bondholder must bring his own action.

Gray vs. Rothschild, 112 N. Y., 603.

O'Brien vs. Fitzgerald, 6 App. Div., 309, S. C. 150 N. Y., 575.

In the Appellate Division, Morgan J. O'Brien, J., said of the complaint:

> "In effect, the complaint alleged, first that the

defendants Bullis and Barse agreed to convey to the trust company a certain number of acres of unincumbered timber land, to be included in a mortgage as security for the issue of bonds, but instead thereof, and fraudulently and as a compliance with these contracts, they assumed to mortgage land which was not unincumbered, but the greater part of which was subject to mortgages or other liens or incumbrances, for a large amount of which they had no title at all; and, *second,* that the said defendants were interfering with the construction company engaged in constructing the railroad under the agreements, and that said defendants are making certain unauthorized construction of lines of railroad; and, *third,* that the defendant trust company is threatening and is about to execute a release of lands to the defendants Barse and Bullis, and that the plaintiff is without an adequate remedy at law to prevent the same. The relief demanded is a judgment for the specific immediate performance of the agreement to convey, or that the defendants Bullis and Barse be required to pay to the trustee, for the security of the bondholders, such a sum of money as the court shall ascertain to be equivalent to the value of the lands which they had agreed to convey; and, second, an injunction against the trust company and the other defendants to prevent the other acts complained of."

(2 App. Div., p. 548).

On appeal from the last decision of the Court of Appeals, in discussing the demand for a trial by jury the Court of Appeals said:

> "The mode of trial was to be determined *by the cause of action set up in the complaint.* (Untermyer v. Beinhauer, 105 N. Y., 521.) *The complaint alleged a cause of action for the specific*

performance of a contract. Such a suit was properly triable before the court without a jury. Nothing had then appeared to disclose the propriety of a trial in any other manner. The relief demanded was not only specific performance, but also that the appellants be required to pay to the trustee for the security of the bondholders an amount equal to the value of the lands which they had agreed to convey. In other words, the relief demanded in effect was that the defendants should be required to furnish to the trustee substituted security for the payment of the bonds if they could not specifically perform their contract." (158 N. Y., 469).

This view of the complaint was challenged by a motion for a re-argument, with this result:

"Motion for re-argument denied, with costs." (See 158 N. Y., 466; 158 N. Y., 719).

This very brief but emphatic decision settled once for all that counsel for Bullis and Barse must accept the construction put upon the complaint by these Courts, and regard it as simply a complaint setting forth a cause of action in equity for specific performance of contract.

To say because counsel for Bullis and Barse insisted that this was not the true construction of the complaint they may not now avail themselves of these decisions, is a remarkable proposition. It was perfectly proper for counsel to insist then that the complaint set forth a cause of action at law for damages for breach of contract, or a cause of action at law for deceit, and, therefore, they were entitled to the jury trial which they demanded at the beginning of the trial for the purpose of raising this identical question. This question was raised, discussed by counsel and Court, and determined by the Court.

However ambiguous the complaint may be, however two-faced it may be, the Court was bound to construe it as setting forth a cause of action on contract and a cause of action in equity, and not a simple cause of action at law, if such construction was permissible, because the Court was bound to uphold the judgment rendered, if it could fairly do so upon the record. The Court did read the complaint, the prayer for relief at the end of the complaint, and did lay stress on that prayer for relief as showing the construction to be put upon the complaint. The conclusion was thus reached that the complaint could receive the innocent construction which the Court there gave it.

It would be extraordinary if the successful counsel on those appeals could now step into the shoes of defeated counsel and get the Courts to face about and now determine that the action was always an action for fraud or misappropriation of money, wherein a jury trial is a matter of right, no matter how many equitable causes of action are added to it in the complaint.

> *See Davis vs. Morris*, 36 *N. Y.*, 569; *Davison vs. Associates*, 71 *N. Y.*, 333; *and especially Wheelock vs. Lee*, 74 *N. Y.*, 495.

It was determined in the litigation that the cause of action alleged was for specific performance of contracts. In other words, that cause of action necessarily rested upon contract. If the contracts had been performed that was the end of the cause of action. If the contracts had been partly performed to that extent they were out of the case. If they had not been performed in part to that extent they were before the Court. If the plaintiff could show he and the other bondholders did not accept the partial performance as a full performance this would be one step towards a recovery. If the plaintiff could go further and show that after he bought his bonds he discovered that the mortgage made was not such a mortgage as the contracts pro-

vided for in the respects stated, he would go a step further toward a recovery. If he could go still further and show that by their conduct at least Bullis and Barse pretended or represented that the lands which they were mortgaging were such as the contracts called for, he would take the final step to a recovery, according to the decisions rendered.

Actual fraud was not an essential ingredient of the complaint or the proof. It was enough that the plaintiff and the other bondholders had been misled by the conduct of Bullis and Barse.

The action was not unlike an action to reform the mortgage. In such an action it would be sufficient to show that the contracts provided for a better mortgage, and by inadvertance, mistake or fraud, the mortgage provided for was not in fact executed. To the extent that the mortgage executed was not the mortgage provided for, the Courts would reform it if the proof was sufficiently strong and clear. Whatever we may have thought or argued the decisions rendered constrained us to accept this reasoning.

These considerations bring this case squarely within the principle laid down, and squarely within the decision made in Burnham vs. Pidcock, 58 App. Div., 273. In that case Rumsey, J., said.

> "This statute differs from the Bankruptcy Law of 1867, in which it was provided that no debt created by the fraud or embezzlement of the bankrupt * * * * should be discharged. * * * * The judgments which are excepted" (from the present act) "from the effect of a discharge in bankruptcy are, as it is expressed in the statute, judgments for fraud. The phrase means that the fraud is the gravamen of the action in which the judgment is recovered, and that proof of the fraud is essential to the right of recovery. It does not include a judgment in which the right of recovery is based

upon an act which is not essentially fraudulent, although in that action fraud may be incidentally shown. * * * * This action is brought for the conversion of goods. It is not essentially an action for fraud. * * * * It is quite true that in this particular case the learned Court in New Jersey, in determining the motion for a new trial, said that the act of the defendant which made him liable for the conversion was fraudulent, but that statement does not change the nature of the record, nor can the *opinion of the Court* be taken as proof that fraud necessarily lay at the foundation of the action, even if that could be established outside of the record, which we do not think." (58 App. Div., opinion pp. 275-276).

Other experienced judges have taken the same view of the Bankrupt Act of 1898.

In Hargadine-McKittrick Dry Goods Co. vs. Hudson, 111 Fed. 361 (Circuit Court, Eastern District of Mo., Oct. 1901), it is held:

"A judgment rendered on promissory notes cannot be brought within Bankruptcy Act 1898, Section 17a, Clause 2, excepting from the provable debts released by a discharge debts which 'are judgments in actions for frauds' by evidence that the debt was fraudulent in its inception; the creditor being conclusively bound by his election to waive the fraud and sue on the contract."

The Court, Rogers, District J., at page 363, said:

"To say that an action on a promissory note, in the usual and ordinary form, is an action for fraud, is not tenable. Where a note is founded in fraud, two remedies exist. The holder may waive the contract and sue for the fraud, or he may sue upon the note and waive the fraud. The plaintiff in this case chose the latter course, and

took its judgments on the notes. Under this statute it must be bound by that record, and cannot go back of it."

The above case was affirmed by the Circuit Court of Appeals, 122 Fed. 232.

In re Rhutassel, 96 Fed. 597 (District Court, Northern District of Iowa, September, 1899), it is held that

"If the bankrupt obtained a loan of money from the bank by means of false representations as to the amount of property he owned, and gave his promissory not for the amount of the loan, a judgment on such note is not a judgment in an action for fraud or obtaining money by false pretenses or false representations, within the meaning of Bankruptcy Act, Section 17, providing that such judgments shall not be released by a discharge in bankruptcy."

The Court, Shiras, District Judge, says, (p. 599):

"The second clause of this section does not except out from the effect of the discharge claims created by fraud, or by obtaining property by false statements or by willful and malicious injuries to the person or property of another, but does except out judgments rendered upon causes of action of the named nature, and, therefore, to come within the exception it must appear that the creditor holds a judgment which was rendered in an action for fraud, or for obtaining the property by false pretenses, or by false representations, or for willful and malicious injury to the person or property of the creditor. In other words, the judgment rendered, in connection with the pleadings upon which it is based, must establish the fact that the claim sued on and mentioned in the judgment, was created through fraud or by false pretenses, or by willful and malicious injury to the person or property of another. * * * * As

> already stated in the specifications filed in opposition to the petition for a discharge, it is shown that the judgment held by the bank is not based upon any fraud proven to have been committed by the bankrupt, but is founded upon the promissory notes executed by him."

In answer to these decisions counsel below referred the Court to Forsyth vs. Vehmeyer 177 U. S., 177. That case is entirely different from the case at Bar. That case arose under the Bankrupt Act of 1867. It involved a judgment of the State Courts of Illinois rendered in 1871. In that case, although the complaint was defective, the proof clearly disclosed a fraud within the Act of 1867. Under the Act of 1867, it was not essential that the fraud should appear in the complaint if it appeared in the proof.

Because it was not essential that that action should be one for fraud to bar a discharge of the bankrupt under the Act of 1867, upon the facts there disclosed. Peckham, J., there said:

> "A representation as to a fact made *knowingly*, falsely and fraudulently for the purpose of obtaining money from another and by means of which such money is obtained, creates a debt by means of a fraud involving *moral turpitude* and *intentional wrong*." (Opinion, p. 182.)

In the opinion of Justice Rumsey, from which we have quoted, it is conceded that such was the law under the Act of 1867. Our State Courts are continually making decisions under the present Bankrupt Act that follow the opinion of Rumsey, J., in Burnham vs. Pidcock, 58 App. Div. 273. (See Collins vs. McWalters, 35 Misc., 650.)

As to misappropriating money, we regard it so perfectly clear that Bullis was *not acting in a fiduciary capacity*, and did not misappropriate money, either on

the allegations of the complaint or the finding of the Court, and that the money realized on the bonds was "fully" expended in building railroad and discharging liens, that we will not discuss or argue it. The statute itself is in the alternative and the cases provided for in subdivision 4 are entirely different from those provided for in subdivision 2. This being so, we read subdivision 4 by itself and find it in substance providing for defalcation, conversion, or misappropriation of funds to one's own use *while one is acting as an officer or agent of some principal.* As no such case was alleged, proved or found, it is unnecessary to discuss the law upon that point. The money having been "duly and fully applied" to build railroad and pay liens (findings of fact, p. 137, folio 545) there was no misappropriation, conversion or embezzlement by an officer or agent of the money of the principal. The officer did not wrongfully take or use the money of the principal, hence there is no ground upon which to claim Bullis was shown guilty of any "defalcation." The Court below held with us upon this point. (Pp. 227-8.)

II.

The New York Courts erred in overlooking the broad distinction between actions ex delicto and actions ex contractu, and in the consequent conclusion that "the respondent is not concluded because he elected to proceed by a suit in equity;" also in its conclusion that "the back-bone of the action, whether viewed strictly as one in equity or for damages in lieu of equitable relief to compensate the bondholders for the misconduct of the defendants, was the fraud of the latter" (pp. 224-227).

The action was upon the contracts. Without the contracts there was no obligation to put up land. Upon the obligation of the contracts the Courts rested their judgment that money should be put up to the extent that contiguous timber land of good quantity and title was not mortgaged. The contracts created a contract

obligation to mortgage, and because that obligation was only partly fulfilled according to the finding of the Court, the judgment was that the contract be fully performed. The obligation rested in contracts, the action was to inforce this obligation created by the contracts, and the judgment merely enforced this obligation of those contracts. In its essence the judgment is one of money damages to literally *fulfill* a partial breach of the contracts. The motive, or reason, for the partial breach of contracts became unimportant because the suit was in equity. Mutual mistake, or the inability to perform, that was proved and found, would still leave the contracts partially unperformed, as they were read and construed by the Court. The obligation of those contracts would have required the same judgment as to the part not performed, whether nonperformance was due to fraud, mistake, or financial inability to perform.

Authorities are not cited by the Court in New York to sustain either the conclusion concerning the effect of the plaintiff's election to proceed in equity, or the Court's conclusion that fraud is the back-bone of the action. To sustain the opinion below, two cases are cited arising under the old Bankrupt Law, a law entirely different from the present statute on this point. Having cited those cases, the learned Judge says:

"In the authorities which I have examined no stress is laid upon the form of the action." (P. 225 fol. 806.)

This is correct because under the old Bankrupt Act the form of the action was of no consequence, the character of the judgment was of no consequence; the primary thing was the character of the obligation. But under the present Bankrupt Act this is changed. Now, the character of the obligation is of no consequence, but the vital thing is whether or not we have "judgments in *actions for frauds.*"

Under the old Act, the thing provided was that no

"debt" created by fraud should be discharged. Now, the character of the debt is unimportant, the character of the "action" resulting in the judgment, is the important thing. For this reason we must look sharply at the difference between the language used in the old and new Bankrupt Law. Certainly, Congress did not depart from the language of the old Act without an intention to change the law.

This very point has been up, and the difference between the two statutes resulted in the discharge of a judgment under the present Act, where it could not have been discharged under the old Act, as appears from the opinion of Rumsey, J., in the case, Burnham vs. Pidcock, 58, App. Div., 275-276.

This difference in the Acts makes the cases under the old Act inapplicable here. This difference between the Acts makes the character of the action here of vital importance. The language used in the present Act undoubtedly has reference to the distinction between actions *ex delicto* and actions *ex contractu*.

A strong argument can be made to show that the language of the present Act was used for the purpose of permitting the discharge of all judgments not actually recovered in common law actions for deceit or fraud. It is not necessary, however, to draw the line so close in this case. It is enough here if the action in which the judgment was rendered was an action *ex contractu* and not an action *ex delictu*. The Court below held that a distinction between these two classes of actions is unimportant. The Court below said: "No stress is laid on the form of the action." That was so under the Act of 1867. The Court below said again: "Whatever may have been the form of the action." (P. 225.) But it was error to apply that principle of the Act of 1867 to the Act of 1898 changed to avoid such a result. The Act was drawn by lawyers from all over the country, was agreed upon by lawyers

representing commercial bodies from all over the country, and it represents the common understanding of lawyers from all over the country. Some of these lawyers came from Code States, and some from common law States. They used words, therefore, that would describe in plain English those cases in which a bankrupt ought not to be discharged.

When we examined the complaint in the action now being considered, however, we find all allegations of intent, and all allegations of scienter omitted. This was because such allegations might make the action one *ex delicto* and result in plaintiff's defeat (Peo. vs. Dennison, 80 N. Y., 656, 84 N. Y., 272; Banks vs. Memphis, 84 N. Y.,428). Their absence would enable him to recover on contract and give him the benefit of evidence that would move a court of equity where it would be insufficient in law. Upon examining it further, we find that the first part of the complaint alleges innocent contracts to build railroads, issue stock and bonds thereon, and secure the payment thereof by a mortgage on railroads, and contiguous lands. The theory of the complaint is that these contracts are honest, innocent, lawful, proper contracts. The complaint, and the contracts themselves, clearly show the *promissory* character of the contracts. Until something was done under the contracts, nobody could be defrauded by them. The contracts look to the future, are promises in writing to do something in the future. They were contracts under seal, and, therefore, strangers to them could not maintain an action at law upon them. They were made, however, for the benefit of brokers and their clients who should buy stock and bonds that were to be produced by, or through, the fulfillment of the contracts. Stock and bonds having been issued, and a mortgage having been made to secure the bonds, the bondholders became interested, as the beneficiaries of the mortgage made in fulfillment of the contracts. One of those bondholders came into court for himself

and all others who saw fit to join with him, and set forth a cause of action in equity. That cause of action was that the contract had only been partly performed. In fact, it was claimed the performance was fictitious, inasmuch as the lands mortgaged were not of the quality provided for by the contracts. It was a serious objection to this position that the very first contract itself provided:

> "The parties are also the owners of, or control, thirty thousand acres of land, on which are extensive and valuable tracts of timber." (Contract, p. 36, fol. 143.)

The Court will notice there is nothing in the language just quoted about having good title, or about the land being free from incumbrances, or about the land being all timbered land. Of course it became a serious question, in an action for specific performance brought on such a contract, whether the Court could take oral testimony of oral statements to put into this contract covenants concerning the title and the incumbrances, and the amount and character of the timber. Strong authorities may be cited to show that this could not be done.

> *Tuthill vs. Wilson*, 90 *N. Y.*, 427.
> *McConihe vs. Fales*, 107 *N. Y.*, 408, *and cases.*
> *Van Werl vs. Winston*, 115, *U. S.*, 228.

This was a strong point because specific lands are not described in the contracts. Why this consideration was not fatal in the action was never made clear.

The Court then took a different view of the case. It thought that so far as the mortgage given was not such a mortgage as should have been given, it could be treated as not fulfilling the contracts. It was decided a court of equity could compel the parties to the contracts to perform the contracts, so far as they had

not been performed, or to put money into the hands of the trustee to take the place of the lands that should have been put under the mortgage. In other words, there was a breach of the contracts; or at least the contracts were still in part unperformed.

Of course it is not intended that this Court could have rendered such a judgment in any kind of action *ex delicto*. In an action *ex delicto*, whatever its form, the relief granted would have been relief in favor of each individual damaged, for the damages that individual had suffered. But in an action *ex contractu* to have contracts specifically performed by forcing the parties to perform them by the decree of a court of equity, we have an entirely different case. Then the court could render a judgment in favor of one defendant against the other; an unheard-of thing in an action *ex delicto*. In such a case we contend that the fraud alleged is not the cause of action. The cause of action is one to enforce the contracts so far as they have not been performed. It is utterly immaterial whether the contracts were not performed because the parties could not perform them, or because the parties would not perform them, or because the parties made a mistake in performing them, or because the parties fraudulently substituted a fictitious performance for a real one. The vital thing in such a case is the non-performance; the immaterial thing is the reason for the non-performance. It is immaterial what reason the Court gave for holding that a court of equity had power to cause the contracts to be performed. If they had not been performed a court of equity could order them specifically performed, whether their non-performance was due to mistake, unwillingness or misconduct. The decree ordering their performance is not important as to its form. Whether that decree be a decree ordering land put under the mortgage, or ordering incumbrances discharged, or ordering money into the hands of a trustee instead of land, is entirely immaterial. The material

thing is that the decree is a decree of the Court ordering the completion of the performance of the contracts. Before the decree was rendered, the parties could be compelled to perform because they had not performed, and why they had not performed was legally immaterial. After the decree was rendered, the parties interested therein could invoke the process of the Court to enforce the judgment into which contracts merged. As the judgment of the Court was for money to be paid the trustee, the entirely adequate process awarded by law to enforce the judgment is an execution. The complaint demanded a decree that the contract be performed, and the Court gave such a judgment.

It was not suggested or claimed that an execution could be enforced against the person. It is not suggested or claimed that any execution ever has been issued against the person. If the claim now made is sound, an execution can be issued against the person.

If an execution can be issued against the person, then we have this peculiar case before this Court for adjudication: An action is brought to specifically perform contracts. When the trial of that action is commenced, the defendants insist that they are entitled to a jury trial under the Constitution. The plaintiffs dispute this claim, and the Court rules to the contrary, and the defendants except. Upon appeal, that exception is presented to this Court, and this Court rules that as the action was one in equity for the specific performance of contracts, the defendants were not entitled to a jury trial. No case is cited in which a body execution has ever been issued to enforce a judgment in such an action. No case is cited in which any court has ever held such an action to be an action for fraud. The absence of any charge in the complaint that the parties intended to defraud, or knowingly made false representations, would be fatal to such a claim. And yet the Court below, for the reasons given, has held that

Mr. Bullis cannot be discharged from this judgment because it is one in an action for fraud. It is not an action for fraud. It is not an action in tort. It is not an action *ex delicto*. It is an action on contract; an action *ex contractu*.

Do the cases, which the Court did not notice or comment on, conflict with the conclusions reached by the Court below? Is there any peculiar practice in New York upon this subject? The cases answer No. Let us consider some of them.

CASES.

A. *Ex contractu* or *ex delicto*.

In Byxbie vs. Wood, 24 N. Y., 607, 611, it is said:

> "What valid objection is there to treating these words ('fraudulently and by deceit') as mere inducement, containing a statement of the facts which show that Marvine's payment was not a voluntary one, with knowledge of the facts, and that, therefore, he was entitled to sue to recover back the money, and thus anticipating a defense?"

In Ledwich vs. McKim, 53 N. Y., 307, it is said in the opinion (p. 316):

> "The complaint avers the facts which were proven and which make out a cause of action in contract. The presence of the averment as to the representations, even were they averred to have been false and fraudulent, do not make the action one *ex delicto*."

In Segelken vs. Meyer, 94 N. Y., 473, we have a leading case as to the distinction between actions *ex contractu* and actions *ex delicto*, with an opinion by Rapallo, J. The Court said (p. 484):

> "This is clearly a cause of action *ex contractu* * * * * the plaintiff does not by adding to

the allegation that the defendant had refused to pay over the money due—an assertion that he has converted it to his own use—convert the action into one for a tort. The addition is mere surplusage under the circumstances. * * * * The action must, therefore, be treated as in form *ex contractu.*"

If it is claimed this is an action *ex delicto,* we find wanting two vital allegations. In the leading case on the subject, it is said that the essentials of an action *ex delicto* for false representations are "representation, falsity, scienter, deception and injury."

Brackett vs. Griswold, 112 N. Y., 454, *opinion* 467.

Of course, if the intent to deceive is necessary in such an action, it must be alleged in the complaint or the action will not be one for fraud within the Bankrupt Act.

How absolutely essential knowledge and guilty intent are to such actions where false representations are claimed to have been made, will be seen by examining the various cases in which the representations made in a prospectus by a corporation, although false, were not shown to have been knowingly and intentionally made by the parties signing the prospectus. Again and again the jury gave a verdict in favor of the plaintiff, but again and again the Court of Appeals reversed the judgment thereon for want of any proof of knowledge or fraudulent intent.

(See Arthur vs. Griswold in various forms, as reported in 55 N. Y., 400; 68 N. Y., 294; 80 N. Y., 128; 89 N. Y., 112; 112 N. Y., 454, and 128 N. Y., 644-648.)

If the action is in equity, a finding of fraud is immaterial and not conclusive. A head note of Lorillard

vs. Clyde, 99 N. Y., 196, correctly states that case as follows:

> "Where, in an equity action, questions of fraud are submitted to and passed upon by a jury, which have no relevancy to the issues presented by the pleadings, and are not involved in the judgment, they are not conclusive upon the parties in a subsequent action."

The Court pertinently said (p. 200):

> "It is the judgment of the Court and not the findings of the jury which bind the parties. The adjudication is not in the verdict but in the judgment adopted by the Court. (Freeman on Judgments, Sections 251, 257, 271.)"

For these reasons a finding does not change the character of the action. The (present) Bankrupt Act lays the stress on the character of the action, and the complaint, not the findings, necessarily determines the character of the action. The action brought was one in equity to enforce contracts, and, as a necessary incident, to ignore, or reform, the mortgage made in performance of the contracts. In effect, it was necessary to ignore, or reform, the mortgage that the contracts might be performed. When this action was brought, at the most the plaintiff had an option to bring an action at law for the damages which he alone had suffered, an action to recover back money paid over on the mistaken notion that it was paid over under a mortgage that fulfilled the contracts, or an action in equity for himself and all others to specifically perform the contracts.

Gould vs. Cayuga Co. National Bank, 86 *N. Y.*, 75.

Having obtained "substantial benefits" by "partial performance" he could not retain them and rescind, but he had to seek full performance or damages for the partial breach. Kaufman vs. Reader, 108 Fed., 171 S. C., 54 L. R. A., 247 and 252 and cases cited.

Without the contracts no action at law for fraud could have been maintained. This is so because the bonds and mortgage would have been the only contracts, and their covenants alone would have furnished the only personal obligations of the parties.

As Bullis was not personally a party to any personal covenants in either bonds or mortgage, the plaintiff, who bought bonds relying on the mortgage being on good, clear timber land, could not hold Bullis for his money. The Trustee received plaintiff's money, paid it to the Railroad Company, and so plaintiff had to get better security or get his money back. He alleged the Railroad Company was insolvent, so he could not get it back, and then brought his equity action to get a better security, either land or money.

Having thus elected to bring the action in equity, the distinction between action *ex contractu* and actions *ex delicto* becomes very important. Whether he could have brought an action for fraud or not he elected to waive it. The Gould case was an action for fraud, and the Court said (86 N. Y., 83-84):

> "If this had been an action in equity to rescind the contract, the court could have done equity between the parties, and so moulded its judgment as to accomplish that result. It could, if needful, have brought into the litigation matters pertaining to the Trust created by Starin for plaintiff's benefit, and to that end could have ordered that Starin and the Trustee be made parties. This action was brought as an action at law, no mention being made in the complaint of the compromise agreement or of the $25,000 paid to the plaintiff. A purely legal defense was set up; it was tried as an action at law, and no motion was made to convert it into an equity action."

> "It is idle to say that the distinction between legal and equitable actions has been wiped out by

the modern practice. It is true that all actions must be commenced in the same way; that in every form of action the facts constituting the cause of action or defense must be truly stated; that fictions in pleadings have been abolished, and that both kinds of actions are triable in the same courts. *But the distinction between legal and equitable actions is as fundamental as that* between actions *ex contractu* and *ex delicto*, and no legislative fiat can wipe it out. (Reubens vs. Joel, 13 N. Y., 488; Goulet vs. Asseler, 22 id. 225.) At any rate, the difference between an action to rescind a contract and one brought, not to rescind it, but based upon the theory that it has already been rescinded, is as broad as a gulf. They depend upon different principles and require different judgments."

B. *Election.*

Having elected to bring an action in equity for equitable relief—in other words, an action *ex contractu* instead of an action at law for damages and for fraud—in other words, an action *ex delicto*—the election so made fixes the character of the action brought by plaintiff, and amounts to a waiver of any claim to a judgment for fraud. The question is not what kind of an action could he have brought, but what kind of action did he bring? By electing to bring an action upon contract instead of an action *ex delicto;* an action in equity instead of an action at law, the parties necessarily waived all the remedies and rights that would have attached to a judgment in an action *ex delicto.*

The principle of these cases is thus stated in the headnote to Madge vs. Puig, 71 N. Y., 608:

"Where a plaintiff unites in his complaint two causes of action, one of which is bailable, and the other not, be waives his right to bail as to both, and an order of arrest cannot be sustained."

Neftel vs. Lighthouse, 77 N. Y., 96, is a striking case holding that, in a case like this, there is "a complete cause of action on contract, hence the court could properly disregard the allegations of fraud." (Opinion, p. 99.)

Goodwin vs. Griffis, 88 N. Y., holds: "If the cause of action is doubtful or ambiguous every intendment is in favor of constraining it as being in the nature of an action *ex contractu*." (Opinion, pp. 638 and 639.)

In Rothschild vs. Mack, 115 N. Y., 1, the opinion starts off by saying *"a gross fraud was perpetrated."* The head-note states the case correctly as follows:

> "An action in the nature of an action of assumpsit lies against one who has obtained money from another by a fraud, and such claim is a proper subject of an offset in an action brought by the party against whom it exists; the tort may be waived and the action, or set-off, founded on an implied promise to return the money wrongfully obtained."

In the opinion Peckham, J., says: "The cause of action, the tort being waived, was on contract" (p. 8). It was not claimed it was waived otherwise than by bringing that action in equity for a set-off because of the fraud; hence that case is clearly in point here. The intent to waive the fraud is clearly found here in this language of the complaint: *"A great fraud has been committed * * * * unless said defendants, Bullis and Barse, be decreed by this Court to specifically perform their said undertakings and agreements."* (P. 15, fols. 58 to 60.)

The principle contended for here was applied in People vs. Wood, 121 N. Y., 522, where it is said of the complaint in that action (pp. 528-529):

> "It alleges all of the facts necessary to constitute a good cause of action in assumpsit for money had

and received for the use and benefit of its owners, and such actions have been designated from time immemorial in law as actions *ex contractu*.

"The allegations in the complaint that the defendant obtained such moneys upon false, fictitious, excessive and fraudulent charges and accounts, constitute no part of the statement of the cause of action, and do not necessarily render the action in tort, as they are used for the simple purpose of obviating the effect of an audit by the board of supervisors and to anticipate a possible objection which might be taken by the defendant. (Byxbie vs. Wood, *supra*, Neftel vs. Lightstone, 77 N. Y., 96.) Even if, upon the facts alleged, a cause of action in tort might be spelled out from the language of the complaint, it is established by ample authority that it is still optional with the injured party to waive the tort and rely upon assumpsit, if he chooses to do so where the facts authorize such an action. (Goodwin vs. Griffis, 88 N. Y., 629; Rothschild vs. Mack, 115 id., 1.) The right of the plaintiffs to waive their cause of action in tort and found their right to recover upon contract, whether express or implied, is unquestionable, and there is no power either with the defendant or in the court to compel them to proceed upon the tort."

And in Terry vs. Munger, 121 N. Y., 161, the question was up as to whether a party had elected to waive the tort and proceed on contract for goods obtained by false pretenses, and it was held that by bringing an action against some of the parties for the purchase price of the goods, the party had elected to waive the tort, and thereby the sale was affirmed and the title to the property passed to the purchaser.

Numerous authorities are cited to illustrate and sustain the opinion of Peckham, J., in that case. There

from it follows that in bringing this action to enforce these contracts, the parties necessarily elected to purge the non-performance thereof from any fraud connected therewith by substituting a judgment for money in place of the parts of the contracts not performed. Deeming such a judgment as that sued for more desirable than one for damages in an action *ex delicto*, the parties elected to and did sue in equity, *ex contractu*, therefor, and by that election they are bound.

C. *"Promissory" contracts.*

The character of the contracts on which the suit was brought necessarily makes those contracts innocent. They describe no land; they promise, in the future, to identify and mortgage land. Their freedom from covenants as to incumbrances, title or timber, has the same effect. The Court would not compel a purchaser to take property where the title was not good because the contract was silent about it, unless the contract clearly showed that the parties contracted with reference to the title as it was. But if it clearly appeared that the parties took the title with the understanding it was good, when such was not the fact, whether this was done through innocence or fraud, a court of equity could undo the transaction and make it good by a money judgment, or by decreeing other adequate relief.

That fraud in the subsequent transactions of the parties does not vitiate an innocent contract appears from Chesterman vs. Gardner, 5 Johns. Ch., 29, where $1,000 was paid on an executory contract which was not performed, because the land turned out not to be free from incumbrances in accordance with the contract. It was held that the statement that $1,000 was paid because the party fraudulently represented that he was the owner of the premises was insufficient to sustain an order of arrest.

Oatley vs. Lewin, 47 *Barb.*, 18.

In Francis vs. Railway, 17 Abb., N. C. 1, the head-note correctly states the turning point of the case as follows:

> "The principle re-stated that representations as to future events cannot be a constituent of fraud in fact."

And finally, Finch, J., clinches the matter and brings it home to this very case by his statement of the law in Sparman vs. Keim, 83 N. Y., 245, as follows:

> "Those alleged were only that the artistic decorating business into which the plaintiff was invited to put his capital 'would yield large profits,' and the only representation proved was 'that it was a good paying business.' The representations were *promissory* and matter of opinion, and had respect to the developments of the future. There was nothing in them on which to found an action *ex delicto*." (Opinion, p. 249.)

When O'Beirne brought his action his counsel knew he could not maintain an action *ex delicto* against Bullis, because it was not alleged, or found, O'Beirne, a subsequent bondholder, ever saw, or communicated with Bullis before buying his bonds. His only action, therefore, was the one in equity on contract, which he elected to bring and brought. How can he be treated now as if that action was one at law, not in equity, an action *ex delicto*, not an action *ex contractu?* The Federal decisions are to the same effect. This is so well known that a few only will be referred to for the convenience of the Court.

D. *Federal rule the same.*

In a recent case before Mr. Justice Brewer and able associates, we have a case in point.

There the plaintiff loaned money upon real estate. These loans were made by local directors, and were

not to exceed 50 per cent. of the real estate value. The defendants became such local directors, knowing all this, and that they might be in position to pass such loans, and then proceeded to appraise land at $900, worth only $100, and to pass a loan of $450 thereon, which loan was made accordingly by plaintiff. The plaintiff foreclosed its mortgage at an expense for foreclosure and taxes exceeding the value of the land. There were other similar loans. The facts in detail were thereafter alleged and the plaintiff sought judgment thereon against defendants for its loss. No intent to defraud was alleged in the complaint. The defendants demurred upon the ground, really, that the facts showed a fraud was alleged, and, therefore, the action was barred by the Kansas statute of limitations. The Court said:

> "The question presented, then, is whether this is an action *ex contractu* or *ex delicto*, and that question must be answered by the amended petition. * * * * *This is not, in our judgment, an 'action for relief on the ground of fraud.'* It may be that the facts strongly indicate—perhaps they are sufficient to warrant the legal inference—that fraud was committed. This is very frequently the case when a covenant is broken, but one who breaks his agreement cannot deprive the other party to the contract of his right of action for a breach by committing a breach and a fraud at the same time. In such a case a party has a right of action for relief on the ground that the contract is broken, and a right of action for relief on the ground of fraud, and the wrong-doer has not, but the injured party has, *the choice of remedies*. He may bring his action for damages for the fraud, or he may waive the tort and sue on the contract. Pom. Code Rem., sections 567-571."

Mo. S. & L. vs. Rice, ~~113~~ 84 *Fed.* 131-132-134.

Apply that decision here. O'Beirne was a bondholder. If fraud had resulted in his buying bonds as secured, when they were not secured, he had his right of action at law for fraud, but such an action he did not bring. If he was a party to the contracts, or became such by assignment, he could sue at law for damages for their breach, even if that breach was produced by fraud, if the fraud was only incidentally pleaded to show the breach, but such an action he did not bring. Or he could allege the "partial" performance of the contract, because mistake, or fraud, prevented the complete performance, and then ask, as here, for specific performance of contract, and this action he brought. But in such a case either action brought is an election to waive the others; for even bringing an action at law for damages, where only nominal damages are recovered, is held to be a bar to an action in equity for specific performance.

Slaughter vs. Co. F. &c., 119 *Fed.* 588.

This is there said to be

> "not because the remedies are inconsistent. On the contrary, they are alternative. *Both are in affirmance of the contract*, and, indeed, remedy in both forms might be sought in one and the same action. Connihan vs. Thompson, 111 Mass., 270. * * * * If he sues at law for a breach and damages* * * * recovering them, whether the amount be large or small, bars him from insisting thereafter in equity that defendant perform the contract." (Op. 119, Fed. 589.)

So the action for specific performance in equity is "in affirmance of the contract?" It is an action of the broadest character for relief founded upon the executory obligation of the contract as yet unfulfilled. Whether the judgment rendered in such an action be for land, or money, can it be doubted that judgment is

upon contract? Does it absorb the executory part of the contract? Is not the executory part of such contract merged in such judgment? Bringing such an action for such relief is a "choice of remedies" that is an election to treat any fraud alleged as merely the incident of the contract, the contract, so far as it is unfulfilled, being the main, substantive, and vital thing in the action. The judgment that merges such contract must be a judgment upon contract, not one for fraud.

III.

The Court below should have held Bullis was entitled to his discharge.

The Court below was mislead by the fraud cry of counsel.

The Court apparently lost sight of the fact that there was a finding that Bullis was rendered bankrupt by the transactions in question long before the judgment was rendered. The findings show that he owned or controlled three small railroads, thousands of acres of timber land, considered himself worth $150,000, and that he entered into these contracts and mortgaged his railroads and his timber lands in performance of them. They show that every dollar obtained was expended in paying off liens upon the railroad, or building railroad (p. 137, fol. 545; p. 145, fol. 578). They show that Bullis united in a guarantee of dividends on part of the stock, and gave to Newcombe & Co., and their associates, as commissions, and to interest them, nearly one-half of the stock, including that on which dividends were guaranteed by him (p. 145, fols. 579-580). They show that the parties knew he did not own the timber on much of this land at the time, and that the mortgage was altered for this reason (p. 147, fol. 586; pp. 149 to 151, fols. 596-603). They show that this land and these contracts were got up by Newcombe & Co., and their associates (p. 152, fol. 607).

The natural result of such circumstances was that Bullis was stripped of his property, the foreclosure of this mortgage was commenced at the instance of the bondholders (p. 156, ll.d. 6/21), and Bullis was rendered insolvent before the O'Beirne judgment was rendered (p. 155, ll.d. 5/10).

With such facts found in the record, it does seem unjust to deny this man his discharge in bankruptcy because in an equity suit he was ordered to perform contracts that he had already performed to the extent made possible by all the property he possessed. The contracts having been innocently made, any debt growing out of them, by judgment or otherwise, would be an innocent debt, and one that could be discharged, even under the old Bankrupt Act.

In Bowes re. Bennett, 21 Man., 3/31, 2/32, it is expressly held in a case of this character:

> "If the contract was fair and honest when made, although the debtor subsequently may be guilty of fraudulent conduct in respect of it, yet such conduct does not cut off the benefit of the discharge."

And (p. 5/21):

> "We conclude that the declaration does not set out a cause of action from which the defendants were not released by their discharge in bankruptcy."

So here, if the mortgage is treated in part as fraudulent, when it is disregarded and treated as a nullity, what we have left is the innocent part of the mortgage and the innocent contracts and the action upon them. Now, when the Court finds the defendants cannot get the fee of the land under the mortgage as agreed in the contracts, it orders the defendants to get the money value of the lands under the mortgage in fulfillment of the contracts. Surely, the contracts are innocent and honest, and the judgment upon the contracts is mon-

sent and honest. Is it not equally clear that the judgment upon the contracts disregards all intermediate transactions and purges the case thereof? Can it be possible that the parties can sue upon their contracts, treat part of the mortgages as a nullity, and have a money judgment, and then that they may also prevent the discharge of the judgment resting upon an invalid contract in its foundation? Neither the old Bankrupt Act nor the present Bankrupt Act contemplate such a result.

This case is controlled in principle by Sage v. Lamb, 69 N. Y., 448.

There the fraud alleged was that the plaintiffs were induced to give acceptances to be secured by chattel mortgage, by means of false representations as to a special indebtedness represented to be due to one Sargent. The Bankrupt Act having been paid on these acceptances, an action was brought thereon. The defendants treated their discharge in bankruptcy under the old Bankrupt Act as a defense. The Court left the case to the jury on the issue of fraud, and the jury found with the plaintiff. Rapallo, J., wrote the opinion on appeal, and, among other things, said (p. 450):

> "In charging the jury, the learned judge also provided in the event that it was unable to agree upon other questions than those arising upon the alleged representations, made before the execution of either of the mortgages as to the amount of the indebtedness of the defendants to Sargent & Co. [illegible] or other and subsequent amounts. To the error upon the part of the plaintiffs was formally, this was apparently the only point upon which a verdict could upon false representations could rest. The other representations appear to have been promissory in their character, relating to the future, and not to existing facts. The learned judge

therefore confined himself in his charge to the jury to instructing them that if the representation that the indebtedness of the defendants to Richards & Collins, on Special account, was only $10,000, was made and was untrue, and the plaintiffs relied upon it, and gave the credit upon the faith of it, and had been thereby damaged, they were entitled to a verdict.

"This charge omitted the element usually necessary to sustain an action for fraudulent representations, viz.: that the representation was known by the party making it to be false, and was made with intent to deceive."

Again (p. 432):

"In the cases of Meyer vs. Amidon (45 N. Y., 169), and Oberlander vs. Spiess (id. 175), the general rule was recognized, that an action for fraudulent representations cannot be maintained without proof that the defendant believed, or had reason to believe, at the time when he made the representations that they were false, and, consequently, that they were fraudulently made."

Accordingly, the judgment of the General Term was affirmed, and the effect of the decision was to hold that the discharge in bankruptcy discharged the defendants.

Here we have two cases applying the very principle for which we contend. In each case, the fact that the contract was innocent was the controlling factor, notwithstanding that each case was in form an action at law for damages for deceit and fraud. If the innocent character of the contract was so controlling under the old Bankrupt Act, in actions at law for damages for fraud, is not the present Bankrupt Act clearly applicable to judgments enforcing the specific performance of contracts, no matter what the facts, or what the reason inducing the Court to order their performance? Are not

such judgments in truth judgments in actions upon contract?

The policy of the law favors the construction for which we contend. It is the object of bankrupt acts to free men from liabilities, that they may again enter commercial life untrammeled. There is no reason for denying a man a discharge in a case of this character, where the parties opposing it have waived the alleged fraud by bringing their actions upon contract for performance of those contracts. If such parties are willing to take a judgment for money only for performance of the contract, we cannot see why they are not in precisely the same position that they would be if they had waived the tort and sued for the purchase price of goods obtained by false representations. We cannot see why they are not in the same position that they would be if they had alleged the fraudulent character of representations upon which an extension of time had been obtained, and, proving those fraudulent representations, had obtained a judgment upon their obligations, because they were able to ignore the extension because of the fraud through which it was obtained.

Recent cases observe the distinction between actions *ex contractu* and *ex delicto*. Breach of promise with seduction added does not result in a judgment that cannot be discharged, because the basis of the action is the breach of the contract to marry. Disler vs. McCauley, 66 App. Div., 42. But an action for criminal conversation, or for seduction alone, will result in a judgment that is not discharged by bankruptcy. Colwell vs. Tinker, 169 N. Y., 531-535. Even under the old act, bringing an action might show there was no moral turpitude. O'Neil vs. Clark, 95 U. S., 704.

Illustrations might be multiplied, but this case comes back to the proposition that the parties opposing the discharge of Bullis elected to waive the alleged fraud and bring an action in equity for the performance of the

contracts. They thus rested their action on contract. Without the contracts they had no cause of action. With the contracts out they were under no obligation to put up land, or money in the place of land. With the contracts in, the real question was, had they been fully performed? The non-preference in part gave rise to the right to enforce the part not performed. The judgment is *perform the contracts so far as they are not performed.* Kaufman vs. Reader, 108 Fed., 171; S. C. 54, L. R. A. 247, 252 and cases cited.

Instead of obtaining a judgment in an action for fraud, they obtained a judgment in an action to have contracts specifically performed. Having thus obtained a judgment for the performance of their contracts, which does not differ in substance from a judgment ordering a man to pay the amount agreed to be paid upon bonds or mortgages, or notes, or other obligations for payment of money, we cannot see why the judgment is not discharged under the present Bankrupt Act. The intent of that act is that if parties do not bring an action *ex delicto*, for fraud, and obtain a judgment therefor, they cannot prevent the discharge of a bankrupt. If they bring an action *ex contractu*, when they might have brought one *ex delicto*, the fact that it is shown, or held, that the facts were such as would have sustained an action *ex delicto* is immaterial under the present Bankrupt Act. Under the old act the stress was on the character of the obligation, but now it is on the character of the action. But here the original obligation is found in innocent executory contracts, and the action is to perform the parts not performed; hence Bullis is entitled to his discharge, for he is entitled to it if we look at the obligation under the old law, or the action under the present law. Even if there was fraud, bringing an action in equity on contract, express or implied, for equitable relief, waives the fraud, and results in a simple action "on contract." Rothschild vs. Mack, 115 N. Y., 1-8.

The judgment appealed from should be reversed, and this case should be remitted to the New York Courts, with instructions to grant the motion of the appellant, Bullis, that he be discharged under the Bankrupt Act.

It is equity that promissory contracts that have rendered Bullis a bankrupt should not prevent his discharge because the courts have ordered them performed in an action in equity upon the contracts.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

[redacted]

OCTOBER TERM, 1904.

No. 60.

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Clerk

SPENCER S. BULLIS,
Plaintiff in Error,

vs.

JAMES R. O'BEIRNE, ON BEHALF OF HIMSELF AND ALL OTHER BONDHOLDERS OF THE ALLEGHENY & KINZUA RAILROAD COMPANY, AND CENTRAL TRUST COMPANY OF NEW YORK.

ARGUMENT FOR DEFENDANTS IN ERROR.

FRANK SULLIVAN SMITH,
ADRIAN H. JOLINE,
Of Counsel for Plaintiff in Error.

Supreme Court of the United States.

SPENCER S. BULLIS,
Plaintiff in Error,

vs.

JAMES R. O'BEIRNE, on behalf of himself and all other bondholders of The Allegheny & Kinzua Railroad Co., and Central Trust Company of New York,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF NEW YORK.

ARGUMENT FOR DEFENDANTS IN ERROR.

Statement.

The assignment of error herein brings before this Court for review the orders of the Supreme Court and its Appellate Division for the Fourth Judicial Department and of the Court of Appeals of the State of New York adjudging that the plaintiff in error is not entitled to an order directing the cancellation, under § 1268 of the New York Code of Civil Procedure, of a judgment rendered June 29, 1896, in favor of the defendant in error James R. O'Beirne for $3,586.40 and in favor of

the defendant Central Trust Company of New York for $341,745.65 against the plaintiff in error and Mills W. Barse, adjudging that the plaintiff in error pay to the said judgment creditors the sum of $143.71 costs, and refusing to give effect to the discharge in bankruptcy granted to the plaintiff in error September 19, 1899, under the Bankruptcy Act approved July 1, 1898.

The judgment in favor of the defendant in error James R. O'Beirne was for costs and an allowance in addition to costs, and in favor of the defendant in error, Central Trust Company of New York, for the equal *pro rata* benefit of said O'Beirne and all other holders of the bonds of The Allegheny & Kinzua Railroad Co., in an action brought July 16, 1891, in the Supreme Court in and for the County of New York, wherein said James R. O'Beirne, on behalf of himself and all other bondholders of said railroad company, was plaintiff, and said Spencer S. Bullis, Mills W. Barse, The Allegheny & Kinzua Railroad Co. and Central Trust Company of New York were defendants (Transcript, fols. 638-644).

The suit was brought for the purpose of obtaining specific performance of covenants made by said Bullis, Barse and the Railroad Company based upon false pretenses and fraudulent misrepresentations of fact, or, in the alternative, for damages equivalent to the loss suffered by the plaintiff and his co-bondholders by reason of the fraud perpetrated upon them by the defendants Bullis and Barse. The cause came on for trial before Mr. Justice TRUAX, at Special Term, October 7, 1892. Upon the trial the impossibility of the performance of their covenants by Bullis and Barse was established and the Court directed a judgment of dismissal of the complaint, holding that it had no power to retain the case for the purpose of assessing damages for the fraud. Upon appeal to the General Term, First Department, the judgment was reversed and a new trial ordered (80 Hun, 570). The Railroad Company stipulated for judgment absolute and appealed to the Court of Appeals from the order of reversal, which order the Court of Appeals affirmed (158 N. Y., 466). Bullis and Barse de-

fended upon the new trial before Mr. Justice Barrett, which resulted in the judgment from which the plaintiff in error seeks discharge. An appeal was taken to the Appellate Division, First Department, and the judgment was affirmed (2 App. Div., 545). Upon appeal to the Court of Appeals the judgment of the Appellate Division was affirmed (158 N. Y., 466).

On or about the 8th day of July, 1901, the said Bullis petitioned the Supreme Court of New York, at the Erie County Special Term for an order declaring said judgment cancelled and discharged as to him, upon his discharge in bankruptcy granted September 29, 1899 (fols. 702-722). The application was denied by the Court upon the merits August 26, 1901 (fols. 731-735). An appeal to the Appellate Division, Fourth Department, was taken September 18, 1901 (fols. 737-740), and the order was unanimously affirmed by the Appellate Division, January 7, 1902, Mr. Justice Spring giving the opinion of the Court (7 Am. B. R., 238; 68 App. Div., 508) (fols. 749-824). January 31, 1902, an appeal was taken to the Court of Appeals (fols. 826-828), and the order was affirmed June 27, 1902, without opinion, and September 29, 1902, the judgment of said Court was made the judgment of the Supreme Court (fols. 209-212).

The Writ of Error to the Supreme Court of New York was granted May 18, 1903 (pp. 229-231).

The Nature of the Action and of the Judgment.

The nature of the action in which was obtained the judgment from which the plaintiff in error seeks a discharge and the facts established in the record were well stated by Gray, J., for the Court of Appeals (151 N. Y., 372, 377-383), as follows:

"The plaintiff, on behalf of himself as a bondholder of the defendant railroad company and of all other bondholders similarly situated, brought this action to compel the specific

performance of certain agreements, whereby some 46,000 acres of timber land, in the aggregate, contiguous or tributary to the line of the railroad, were to be conveyed to the trustee in the mortgage made by the railroad company; or to compel the defendant to pay the trustee, for the security of the bondholders, the value of said lands. The defendants against whom this relief is prayed are The Allegheny & Kinzua Railroad Company and two certain persons named Bullis and Barse. It seems that in 1889 there were two partially completed railroads in Pennsylvania operated by the Bradford & Corydon Railroad Company and The Allegheny & Kinzua Railroad Company. There was also in New York a partially completed railroad operated by a corporation of the same name as the one in Pennsylvania, viz.: The Allegany & Kinzua Railroad Company. Of these three railroad companies the defendants Bullis and Barse owned and held all the capital stock. These railroads penetrated a large tract of timber lands in McKean county, Pa. Bullis and Barse devised a scheme, in connection with a firm of New York brokers, styled Newcombe & Co., for the reorganization of the two Pennsylvania companies, and in pursuance thereof an agreement was entered into between them on October 8th, 1889, which recited that Bullis and Barse were the owners and holders of the capital stock of the companies and that they were also owners of, or controlled 30,000 acres of land in McKean County, on which were extensive and valuable tracts of timber, the product of which they were desirous of marketing through the completion of the railroads. It provided that Bullis and Barse should cause to be executed a mortgage, or deed of trust, upon the property and franchises of the railroad companies and upon these 30,000 acres of land to the Central Trust Company, as trustee, for the purpose of securing bonds to the amount of $250,000, which Newcombe & Co. agreed to sell upon certain terms. Bullis & Barse were to place the ownership and control of the railroad property and franchises and of the 30,000 acres of land in a new corporation, to be created under the laws of Pennsylvania. The lands so to be owned by the corporation and covered by the lien of the mortgage, or deed of trust, were to be contiguous or tributary to one or the other of the railroads and should be timbered and profitable to the corporation. Subsequently engineers were sent out, at the request of Bullis and Barse, by Newcombe & Co. and another concern, whom they had brought the matter before, who visited and inspected the timber lands

in McKean County. In consequence of their report and suggestions, the October plan was changed and a new and larger scheme was resolved upon on December 9th, 1889. Upon the visit of the engineers to the timber lands, Bullis had accompanied them, and had pointed out, somewhat indefinitely, what would be the boundaries of the 30,000 acres. All the lands shown were well timbered and were situated on either side of the line of the railroad. The agreement of December 9th, modifying that of October 8th, between Newcombe & Co. and Bullis and Barse, recited the ownership of the capital stock of The Allegany & Kinzua Railroad Company (the New York corporation) by Bullis and Barse, and that it was proposed to consolidate it with the two Pennsylvania companies mentioned in the October agreement. Bullis and Barse were to cause the merger and consolidation of the three companies to be effected, with a capitalization of $500,000 of stock and with a bonded debt of $500,000, secured by a mortgage to the Central Trust Company, as trustee, which should be a first lien upon the properties and franchises of the new corporation and should include 30,000 acres of timber land for the first 46 miles of railroad constructed and completed, and 16,000 acres for the additional 24 miles of railroad to be constructed. Only $300,000 at par value of the bonds were to be put upon the market at first, representing 46 miles of the said railroads, and the remaining $200,000 were reserved for the purpose of completing the extensions of the roads. Newcombe & Co. were to negotiate the sale of bonds at par upon certain terms and conditions. Bullis and Barse were to cause a contract to be entered into with The Interior Construction & Improvement Company, a New Jersey corporation, for the purpose of effecting the proposed merger and consolidation of the several railroads and the issue by the new corporation of said capital stock and bonds. On the same day, accordingly, there was an agreement made between The Interior Construction & Improvement Company and the New York corporation of The Allegany & Kinzua Railroad Co., whereby the former company agreed to effect the proposed consolidation; to complete the construction of the railroads without delay, and to extend them so that the consolidated company should own a completed road of 70 miles in length. This agreement provided for the issuance by the consolidated company of $500,000 in bonds, to be secured by a mortgage which was to cover, in addition to the railroad properties and franchises, 1,000 acres of timber land for each mile of rail-

road constructed and completed, contiguous or tributary to the consolidated railroad, in this manner, viz.: For the first 46 miles of railroad so completed 30,000 acres and for the additional 24 miles of railroad to be completed 16,000 acres. This agreement was executed on behalf of the railroad company by the defendant Bullis, as its president. On the same day, another and third agreement was made between The Interior Construction, &c., Company and Bullis and Barse, which refers to the previous agreement and states the disposition to be made by The Interior Construction &c., Company, of the bonds and stock of the new corporation. By that agreement Bullis and Barse, among other things, agreed to cause the proper amount of timber land to be placed under the lien of said mortgage or deed of trust, to be executed by said merged and consolidated corporation, as provided in said agreement; thereby referring to the one previously described between the construction company and The Allegany & Kinzua Railroad Company of New York. The consolidation of these three railroad corporations was effected in February, 1890, under the name of the present defendant, The Allegheny & Kinzua Railroad Company, and thereupon the new company executed and delivered to the defendant the Central Trust Company, as trustee, its mortgage to secure bonds for the aggregate amount of $500,000, par value. This mortgage by its terms covered all the railroad properties and franchises, and the defendant Bullis and his wife united in its execution, as it is expressly found, with the knowledge and approval of the defendant Barse. There was a recital in the mortgage that Bullis was the owner in fee of the real estate thereinafter described and it purported to convey to the trustee, on the part of Bullis and his wife, numerous tracts and parcels of land, to the extent of 30,954 19/100 acres. There was also a covenant by the mortgagors that the railroad company should cause to be conveyed to the trustee, in addition to the 30,000 acres of timber land conveyed by that instrument, 16,000 more acres, as a further security for the payment of bonds, upon the completion by the railroad company of the 70 miles of railroad. It was found as a fact by the trial judge, that the execution of this mortgage by Bullis and wife was in apparent and partial performance of the undertakings and contracts contained in the earlier agreements and of the scheme of consolidation and extensions. The bonds were executed and delivered by the railroad company to the trustee, and of the $300,000 which were to be presently

disposed of all but $40,000, which Newcombe & Co. retained for their commissions, were duly sold by that firm to the plaintiff and his co-bondholders in good faith, and the finding further is that the proceeds of these $260,000 of bonds were applied to the extinguishment of liens and to the construction of 46 miles of railroad, $125,000 being the proceeds of the sale at par of $125,000 of these bonds, were paid over to the defendants Bullis and Barse, for the purpose of extinguishing liens and incumbrances upon the properties of the various constituent companies. It was also found as a fact, that the bonds were retained and sold by Newcombe & Co. with full knowledge and reliance upon the said several agreements * * * and particularly upon the provisions contained therein for the conveyance to the defendant trust company of 30,000 acres of timber land, as a further security for said bonds, of the character described in said agreements and of the kind and value stated and described by said defendants Bullis and Barse. It was also found in substance, that the defendants Bullis and Barse at the time of the agreements which have been described, had represented to Newcombe & Co. that the said 30,000 acres of land were timbered, clear of incumbrances, contiguous to the line of railroad, as the same was constructed and projected, and that said land was covered by merchantable timber sufficient to provide a railroad with, at least, 70 tons of freight to the acre for conveyance over the railroad at certain rates. It is also found that Newcombe & Co. approved and accepted the said mortgage, relying upon the representations of Bullis that he was the owner of the tracts of land described therein, and believed that, by reason of such representations, Bullis and Barse were in good faith performing their covenants and agreements in that behalf, and in reliance thereon they proceeded to perform their agreements with said Bullis and Barse. Bullis and Barse failed and refused to continue the work of construction in August, 1890. Certain findings of fact show that of the lands mentioned and described in the mortgage, some portions were not owned by Bullis at the date of its execution; that some portions were not timbered, or had all the timber removed from them; that Bullis did not have the title to the soil of some portions; that he did not have free and unincumbered title as to certain portions, and that 'of the lands mentioned and described in the said mortgage, 1,900 acres thereof * * * were owned by said Bullis at the date of said mortgage.' The finding also is that Bullis has not since

acquired good and sufficient title to the land described in the mortgage.

These findings have ample support in the evidence; but the court at Special Term dismissed the complaint; holding that a specific performance could not be decreed, because there was no proof as to what lands were owned or controlled by the defendants Bullis and Barse, except the lands described in the mortgage. Upon appeal to the General Term, that court agreed with the trial court that specific performance of the contracts could not be decreed; but held that the damages sustained by the plaintiff might be recovered in such an action, where it appeared that though he was entitled to equitable relief, yet it would be unavailing if granted, because of the defendants' inability to perform. The General Term assumed, in the absence of any explanation appearing in the record, that the trial court must have dismissed the complaint upon the theory that as equitable relief could not be granted, the plaintiff was not entitled to legal relief; an assumption which, it must be conceded, is the only one permissible upon the case. The General Term was undoubtedly right in holding as they did. The plaintiff has set forth in his complaint all the facts constituting a cause of action for specific performance, and, upon it appearing that that relief could not be granted, he had at least the right to a new trial wherein he might establish his claim for the damages sustained by a breach of the covenants and agreements relied upon (Sternberger *v.* McGovern, 56 N. Y., 12; Margraf *v.* Muir, 57 N. Y., at p. 159). The trial Court might have retained the cause, to grant such legal relief as might be just (Cuff *v.* Dorland, 55 Barb., 481)."

Judge GRAY thus defines the nature of the action (151 N. Y., at p. 384):

"The theory of the complaint and the tendency of the proof upon the trial were that a *fraudulent scheme was devised by Bullis and Barse, having for its object the consolidation of certain railroad properties, owned and controlled by them, and the issuance of a large number of bonds by the consolidated company, which should be placed with the public at par through the co-operation of Newcombe & Co., whose assistance to the scheme, in the negotiation of the bonds, should be gained by representations and agreements of such a nature, as to the timber tracts to be furnished as additional*

security under the mortgage, that the bonds would appear to be attractive and salable securities. We are not called upon, at the present time, to pass upon the liability of Bullis and Barse for the parts they have played in the development and consummation of this scheme, inasmuch as they have gone back to a new trial; but, on the face of this record, that the evidence amply warranted the findings by the trial Court is not to be denied, and it would have justified the granting of relief to plaintiff had the case been in a shape to make that possible."

Upon the appeal from the judgment of Justice TRUAX dismissing the complaint upon the ground that impossibility of performance, although not pleaded, appeared in the proofs, the General Term (80 Hun, 570), reversing the judgment of dismissal and directing a new trial, laid most emphatic stress upon the fraud underlying the scheme of Bullis and Barse and forming the basis of the claim for damages. Said Mr. Justice FOLLETT (pp. 573, *et seq.*).

"The facts found by the Court upon uncontradicted evidence conclusively show that Spencer S. Bullis and Mills W. Barse perpetrated an *atrocious fraud* upon I. B. Newcombe & Co., the trust company and *every person purchasing the bonds secured by the mortgage.* It is found (findings 28 and 29) that the agents of I. B. Newcombe & Co. were escorted by Bullis, at the request of Barse, through large tracts of heavily timbered land in McKean County, near the railroads, who reported its value to the firm *by which report they were induced to attempt to negotiate the bonds.* A clear understanding of what these individual defendants intentionally accomplished cannot be better disclosed than by quoting the findings of the Court."

The court then proceeded to quote in detail the 25th, 46th, 47th, 52d, 53d and 54th findings, showing the failure of the title of Bullis to the lands in question and the condition and value of those lands, and summarized its conclusions as follows (p. 575):

"*These findings are sufficient to show the magnitude and character of the fraud perpetrated by Bullis and Barse.* By

the forty-ninth and fiftieth findings it appears that much of the land mortgaged was of little value, and by the fifty-first finding, instead of such land being included in the mortgage, that land of the value of at least eighteen dollars per acre should have been included in order to constitute a compliance with the contracts of Bullis and Barse. These findings, in connection with the fact that 4,379 acres of land was valued by the appraisers at one dollar per acre, sufficiently show the value of the land included within the mortgage."

Upon the trial of the cause before Mr. Justice BARRETT, in directing the entry of the judgment set forth in the Transcript (fols. 638-644), he handed down an opinion in which the nature of the action is clearly stated. The opinion, as it appears in the Appeal Book in the Court of Appeals, pages 1493, 1494, is as follows:

"I shall not attempt to go over the points made in the elaborate briefs submitted by counsel in this case. In view of the decision of the General Term upon the first appeal (80 Hun, 570), the main question now presented is one of fact. If the *fraud originally found* has been established then the legal consequences pointed out by the General Term follow. Whatever my own understanding of the law may be I am, of course, bound by the views there expressed. The Court plainly held that even where the inability to decree specific performance existed at the time of the commencement of the action, *the damages sustained by the defendant's fraud may be recovered in the same action.* It also held that where the property which the defendants agreed to place under the mortgage was wanting, they could be required to pay its value to the mortgage trustee for the benefit of the bondholders. Upon the question of fact I am entirely with the plaintiff. The defendants have now been fully heard, and yet the fraud found upon the first trial has not been diminished. Without minutely analyzing the great mass of evidence which has been placed before me, I have no hesitation in giving my verdict (so to speak) for the plaintiff upon all the testimony. The impression which I derived from the trial was that the plaintiff's witnesses were entitled to the fullest credit. I regret to say that I did not derive the same impression with regard to Messrs. Bullis and Barse. Nor is my conclusion upon that head founded solely upon the manner and bearing of the wit-

nesses. The testimony of the plaintiff's witnesses carries conviction inherently. It is favored, too, by the probabilities of the case and by the surrounding circumstances. *The more I reflect upon the testimony adduced, the clearer becomes the fraud perpetrated by the defendants. That fraud was severely characterized by Mr. Justice Follett in delivering the opinion of the General Term, and his characterization fittingly applies to the present conclusion upon the whole case.* It follows that the plaintiff is entitled to the relief asked. He is not confined to his own damages. His action is brought to secure the payment to the trustee of the value of the lands which should have been placed under the lien of the mortgage. That relief under the decision of the General Term is appropriate and should be afforded with costs."

Mr. Justice BARRETT upon the conclusion of the trial, made 169 findings of fact and 15 conclusions of law at the request of the plaintiff (Transcript, fols. 476-637), among which are the following:

Findings of Fact.

"XCII.—That relying upon the representations of said defendant Bullis that he was the owner of the said described tracts and parcels of land and had good right to convey the same, made by his joining in the said mortgage (Exhibit 'D') and believing that said representations were true, and that by reason thereof said Bullis and Barse were in good faith performing their said covenants and agreements in that behalf, the said firm of I. B. Newcombe & Company approved and accepted the said mortgage, and in reliance thereof proceeded in all respects to carry out and perform their agreements with said defendants Bullis and Barse in reference to said lands.

XCIII.—That the statements and representations of said defendants Bullis and Barse with respect to said timber lands, mentioned and referred to in said Exhibits "A," "B" and "C," and Schedule "A" annexed to the complaint, were fraudulent and made with intent to deceive.

XCIV.—That the plaintiff was in fact deceived by said statements and representations.

XCV.—That said statements and representations were false and untrue.

XCVI.—That said agreement was in fact fraudulently made with respect of the lands agreed to be conveyed by said Bullis and Barse.

CXI.—That the value of said lands the soil of which was owned by the defendant Bullis, at the date of said mortgage, but which were not timbered, is $13,350.

CXII.—That the value of said lands which were not owned by said defendant Bullis at the date of said mortgage is $175,502.77" (fols. 556-560; 573-574).

Conclusions of Law.

X.—That this Court has jurisdiction to proceed in this cause by reason of fraud practiced by the defendants Bullis and Barse in the premises.

XII.—The fact that the plaintiff has been deceived by the fraudulent statements and misrepresentations of the defendants is sufficient of itself to cause a court of equity to entertain this suit (fols. 632-634).

The basis of the action was fraud as found by Mr. Justice BARRETT; and his ruling was affirmed by the Appellate Division (2 App. Div., 545), the Court saying (pp. 551 to 552).

"A careful examination of the testimony has satisfied us that the findings of fact by the Court below were amply sustained by the evidence, and we are clearly of the opinion that upon those findings the plaintiff was entitled to the relief granted to him by the judgment."

Upon appeal from the decision of the Appellate Division, the Court of Appeals (158 N. Y., 466) affirmed the judgment and order appealed from and adhered to its former definition of the nature of the cause of action involved.

Said the Court, *per curiam* (p. 468):

"*The right to maintain the action and the right of recovery as established by the decision of the Court upon that appeal were based upon substantially the same facts as exist in this case, and consisted chiefly of the agreements, representations and fraudulent conduct of the present appellants.* While it was then said that we were not required to pass upon the liability of the present appellants, still, it is manifest that that decision necessarily, although perhaps indirectly, involved the question of their liability. The theory upon which the decision proceeded was that they devised a fraudulent scheme for the consolidation of certain railroads owned and controlled by them, issued bonds upon false representations as to the timber lands to be furnished as added security under the mortgage to make the bonds secure and salable, that upon these facts the Court would have been justified in granting relief to the plaintiff against them, and that the corporation, having been the instrumentality employed by them, was also liable. Thus it was that the liability of the appellants was involved in that decision. *We adhere to the principle of our decision upon that appeal.*"

That the basis of the action was fraud is apparent from the complaint. It is therein alleged that "Bullis and Barse *falsely* and *fraudulently pretended* and *represented*" that the "30,000 acres of timber land was free and clear from all encumbrances * * * and that said land was covered by a large quantity of merchantable timber," etc. (fols. 16, 17, 34, 39); that the bonds of the railroad company were issued and sold to purchasers who *knew* and *relied upon* the *pretended* conveyance of 30,000 acres of timber lands (fols. 45-6); that such *pretended* conveyance was *false* and *fraudulent* in the particulars set forth in detail, " all of which the said defendants Bullis and Barse *well knew* at the time they made, or caused to be made, the said *pretended* conveyance of said 30,954.19 acres of land, as well as when they entered into said several agreements and made the said *false* and *fraudulent representations*"; "that by the *fraud* and failure of said defendants Bullis and Barse to cause a proper amount of timber land * * * to be conveyed to said trustee * * * and the failure of the title to a portion of said 30,954.19 acres of land mentioned

in said mortgage * * * a *great fraud* has been committed by said defendants, Bullis and Barse, upon the holders of such outstanding bonds" (fols. 51-59).

The record of the trial before Mr. Justice TRUAX shows, at page 129 of the Appeal Book, that counsel for Bullis and Barse said:

"If there be any cause of action alleged in this case, the cause of action is in fraud, and we demand a jury trial as a matter of right."

Upon the foregoing facts and in support of the contention of the defendants in error that the petition of the plaintiff in error that the judgment in question be canceled and discharged as to him was properly denied by the Courts of New York, attention is respectfully invited to the following:

ARGUMENT.

The claim sued upon and the judgment rendered thereon are not barred by the discharge in bankruptcy of the plaintiff in error, because their basis is his actual fraud.

The Bankruptcy Act of 1898 as well as that of 1867 expressly excepts a debt created by fraud from the operation of a discharge. The Act of 1898, Sec. 17, provides that,

"The discharge in bankruptcy shall release a bankrupt from all of his provable debts except such as * * * (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the person or property of another * * * (4) where created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The corresponding section of the Bankruptcy Act of 1867 provides (Sec. 33): "That no debt created by the fraud or embezzlement of the bankrupt or by his defalcation as a public

officer or while acting in any fiduciary character, shall be discharged under this act."

Mr. Justice Spring, for the Appellate Division, upon the affirmance of the order of the Special Term denying the petition of the bankrupt for discharge from the judgment, said:

"The action in which the judgments were rendered was not one at law for fraud and deceit, but was a suit in equity * * *

The action for specific performance in the strictest sense thereof *was founded upon the actual, positive fraud* of the defendants Bullis and Barse. * * * The gist, the intrinsic ingredient of the action, was consequently the *fraudulent scheme, the false representations* of these defendants. As was said by the Court of Appeals in its first review of the case (151 N. Y., at page 384): 'The theory of the complaint and the tendency of the proof upon the trial were that a fraudulent scheme was devised by Bullis and Barse. * * * when it developed upon the second trial that specific performance was unavailing, the Trial Court retained jurisdiction to proceed 'by reason of the fraud practiced by the defendants Bullis and Barse.' The backbone of the action, whether viewed strictly as one in equity or for damages in lieu of equitable relief to compensate the bondholders for the misconduct of the defendants, was the *fraud* of the latter" (Transcript, fols. 759, 797-801).

In every instance in which the case has been before the Courts of New York, it has been termed by judicial pronouncement *an action for fraud.*

Is the term "fraud" as thus applied to the case at bar equivalent in meaning to the word as used in the Bankruptcy Act?

The general rule is well stated under these statutes by Collier in his work on Bankruptcy (3d Ed., p. 681), as follows:

"It is the settled doctrine of the Court that 'Fraud' in the act of Congress defining the debts from which a bankrupt is not relieved by a discharge in bankruptcy, means positive fraud or fraud in fact involving moral turpitude or intentional wrong as does embezzlement, and not implied fraud or fraud in

law, which may exist without the imputation of bad faith or immorality" (citing):

Neal *v.* Clark, 95 U. S., 704, 709;
Wolf *v.* Stix, 99 U. S., 1, 7;
Hennequin *v.* Clews, 111 U. S., 676, 682;
Strang *v.* Bradner, 114 U. S., 555, 559.
Noble *v.* Hammond, 129 U. S., 65, 67.
Upshur *v.* Briscoe, 138 U. S., 365.

See also Brandenburg on Bankruptcy, Sec. 434.

Applying the test which this Court has established, through the opinion of Mr. Justice Bradley, in Hennequin *v.* Clews, *supra,* at page 681, which is the basis of Mr. Collier's text, to the fraud of the plaintiff in error, the facts meet every requirement of that test and are convincing, that "the fraud referred to * * * means positive fraud, or fraud in fact, involving moral turpitude or intentional wrong, * * * and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality."

In the case of Forsyth *v.* Vehmeyer, 177 U. S., 177, Mr. Justice PECKHAM, reviewing preceding authorities, reaches the following conclusion (p. 182):

"A representation as to a fact, made knowingly, falsely and fraudulently for the purpose of obtaining money from another, and by means of which such money is obtained, creates a debt by means of a fraud involving moral turpitude and intentional wrong. It is not necessary to enlarge upon the subject. It is so plainly a fraud of that description that its mere statement obtains our ready assent."

It is plain that the Courts which have passed upon the acts of Bullis and Barse, that were made the basis of the action against them, in applying the term "fraud" to those acts, intended to use the word as carrying with it the definition given to it by this Court. It already appears that in the General Term Mr. Justice FOLLETT said that they "perpetrated *an atrocious fraud,*" and that the findings were sufficient to show

the *magnitude* and *character* of the *fraud* perpetrated by them. Mr. Justice Barrett said: "The more I reflect upon the testimony adduced, the clearer becomes the *fraud* perpetrated by the defendants. That *fraud* was severely characterized by Mr. Justice FOLLETT, in delivering the opinion of the General Term, and *his characterization fittingly applies* to the present conclusion upon the whole case."

Mr. Justice BARRETT found that "the statements and representations of said defendants, Bullis and Barse, * * * were *fraudulent* and *made with intent to deceive*"; that "the plaintiff *was in fact deceived* by said statements and representations"; that the same were "*false* and *untrue*," and that the agreement between the parties "was in fact *fraudulently made* with respect of the lands agreed to be conveyed by said Bullis and Barse."

In the Appellate Division, Mr. Justice O'BRIEN said: "A careful examination of the testimony has satisfied us that the finding of facts by the Court below *were amply sustained by the evidence.*" In the Court of Appeals, upon the railroad company's appeal, Judge GRAY said:

"The theory of the complaint and the tendency of the proof upon the trial were that a *fraudulent scheme* was devised by Bullis and Barse."

Upon the appeal of Bullis and Barse, the Court said, referring to the railroad company's appeal:

"The right to maintain the action and the right of recovery * * * were based upon substantially the same facts as exist in this case, and consisted chiefly of the agreements, representations and *fraudulent conduct* of the present appellants. * * * We adhere to the principle of our decision upon that appeal."

This Court will accept the findings of the State Courts upon the subject of fraud as conclusive, as it did in the case of Forsyth *v.* Vehmeyer, *supra.*

If this Court will not rest upon the findings of the State Courts as to the existence and nature of the fraud for which

the judgment against the plaintiff in error was obtained, it will determine the same by the record upon which the judgment is based.

Brandenburg on Bankruptcy, Sec. 432, and cases cited.

Collier on Bankruptcy, p. 197, and cases cited.

In Warner *v.* Cronkhite, 13 N. B. R., 52 Fed. Cas. 17180, the action was to recover damages claimed to have been sustained by the plaintiff, by reason of alleged frauds practiced by defendant upon plaintiff in the sale of certain lands; it was *held* that a debt created by fraud is not discharged in bankruptcy, even though reduced to a simple judgment for money, in which there is no mention of fraud; if the original action was based upon fraud, the fraud is not merged in the judgment.

In Boynton *v.* Ball, 121 U. S., 457, 466, Mr. Justice MILLER said:

"This Court, to which this precise question is now presented for the first time, is clearly of opinion that the debt on which this judgment was rendered is the same debt that it was before; that, notwithstanding the change in its form from that of a simple contract debt, or unliquidated claim, or whatever its character may have been, by merger into a judgment of a Court of Record, it still remains the same debt on which the action was brought in the State Court, and the existence of which was provable in bankruptcy."

In re Patterson, 1 N. B. R., 307, Fed. Cas. 10817, Judge BLATCHFORD said:

"Wherever the debt, no matter whether it be in the shape of a judgment or in any other form, was created by fraud, had its root and origin in fraud, there it is not to be discharged."

There is no distinction between a fraud proven in a court of law and a fraud proven in equity.

In re Alsberg, 16 N. B. R., 116, Fed. Cas. 261.

A practical demonstration of the kind of fraud alleged and

proved against the plaintiff in error is suggested by *In re* Marcus, 105 Fed., 907, in which it was *held* that if the bankrupt is not entitled to be protected from arrest on an execution upon the judgment, he is not entitled to a discharge in bankruptcy. In the case at bar the plaintiff could have obtained an order of arrest and would have been entitled to a body execution against Bullis and Barse. Section 549, of the New York Code of Civil Procedure, provides that:

"A defendant may be arrested in an action as prescribed in this section, where the action is brought for either of the following causes: * * *

"Subd. 4. In an action upon contract, express or implied, other than a promise to marry, where it is *alleged in the complaint that the defendant was guilty of a fraud in contracting or incurring the liability.*"

Elwell *v.* Russell, 29 App. Div., 436.
Hoboken Beef Co., *v.* Loeffel, 52 Hun, 611; 23 Abbott's New Cases, 93.

It is stated by counsel for plaintiff in error that there is no allegation in the complaint that the contracts were entered into with a wrongful *intent* (page 8).

If the intent appears from other allegations in the complaint, it is not necessary to allege it in exact words.

Bank of Montreal *v.* Thayer, 7 Fed. R., 622;
Thomas *v.* Belle, 25 N. Y., 244;
Ross *v.* Mather, 51 N. Y., 108;
Miller *v.* Barber, 66 N. Y., 559;
Baird *v.* Malcolm, 2 John., 550;
Brady *v.* Finn, 162 Mass., 260,
38 N. E. Rep., 506;
Schoellhauer *v.* Rointesch (Ore. 1894), 38 Pac. R., 344.

As was stated by McCrary, C. J., in the Bank of Montreal *v.* Thayer, *supra*, "It is said that a fraudulent intent is not alleged; but it is difficult to see how representations as a

matter of fact can be wrongful, fraudulent and false without they are made with a fraudulent intent. It is certainly necessary to prove the intent, and of course it must be alleged, but no form of words is necessary. If the terms employed by the pleader taken in their ordinary signification, necessarily include the idea of a fraudulent intent, that is enough. We must give to the term 'fraudulent,' as found in the petition the meaning which the law gives it, and which attaches to it in common usage, to wit, a deliberately planned purpose and intent to deceive and thereby to gain unlawful advantage * * * it is not necessary in such a pleading to define the meaning of these terms, and to say that the representations were made with intent to deceive would add nothing to the allegation that they were falsely and fraudulently made."

Citing many cases.

The case of Miller *v.* Barber, *supra,* is directly in point, and is conclusive.

It appears to be too plain for extended argument that the plan or scheme, as shown by the record herein, and by all of the findings of the different courts, was of so wrongful, fraudulent and false a nature that it could not have been made without a fraudulent intent.

Indeed, were such a direct allegation necessary, it is submitted that an allegation of intent does exist in the complaint, as shown by the record herein, although the allegation does not make use of the specific word "intent." The allegation of paragraph "XVI" in the complaint is, in part, as follows:

"and plaintiff charges that *all of the acts* above mentioned of said defendants, Bullis and Barse, were and are made entirely *with the view of* increasing the value of their own property and generally in their own pecuniary interest, utterly regardless of the effect thereof upon the said railroad company and its finances" (fol. 83).

It cannot seriously be contended that acts which are done and representations made "*with a view of*" deceiving and defrauding have not the same meaning as acts done and representations made with *intent* of defrauding.

There is no foundation for the claims of counsel for plaintiff in error that the complaint fails to allege scienter. The complaint alleges the representations of Bullis and Barse as made *knowingly, falsely,* and *fraudulently, and with a view* of obtaining money through their fraudulent scheme, and the findings of the Court established that such representations were so made with intent to deceive, and that Bullis and Barse thereby obtained the money of the plaintiff and his co-bondholders. All of the elements are present which are requisite to entitle the plaintiff to an order of arrest and a body execution against Bullis and Barse. It follows that the debt was created by means of, and the judgment was obtained for, "a fraud involving moral turpitude and intentional wrong," and that the plaintiff in error is not entitled to a discharge from the judgment.

Ames *v.* Moir, 138 U. S., 306;
Forsyth *v.* Vehmeyer, *supra;*
Hoyt *v.* Godfrey, 88 N. Y., 669;
Pacific Mutual Ins. Co. *v.* Machado, 16 Abb., 451;
Caldwell's Case, 35 Barb., 444;
Brandenburg on Bankruptcy, Sec. 434;
In re Lewensohn, 99 Fed., 73;
Brackett *v.* Griswold, 112 N. Y., 454.

Upon the argument before the Court of Appeals, when the denial of Bullis's petition for discharge from the judgment was up for review, counsel for Bullis reversed his position upon the trial as to the right of Bullis and Barse to a jury, for the reason that the cause of action stated in the complaint was for fraud, and contended that since the Court denied his motion for a jury trial, the cause of action was not for fraud, but simply on contract for specific performance. The decisions upon the trials of the case do not show that a jury trial would not have been granted if a motion therefor had been made at the proper time, but that the motion was properly denied when made immediately after the case had been called for trial. No

motion for a trial by jury was made at a time when the Court could have entertained the same.

O'Beirne *v.* Bullis, 158 N. Y., 466, 469.

Counsel for the plaintiff in error refer to the absence from the contracts of October 8th and December 9, 1889, of definite descriptions of the lands, and remark that it never has been made clear that this fact was not fatal to the case. This objection was made the basis of the entire argument of Mr. Milburn of counsel for Bullis in the Court of Appeals, and in reply the attention of the Court was directed to the fact that by the allegations of the complaint the several contracts and the mortgage, in which latter the lands were specifically described, constituted one plan or scheme (fols. 35, 40, 44, 45), and this is not denied and is consequently admitted by the answer (fols. 429, 459). The Court did not deem the objection worthy of serious consideration.

WHETHER THE CASE BE CONSIDERED UNDER SUBDIVISION 2 OR SUBDIVISION 4 OF SECTION 17 OF THE BANKRUPTCY ACT, THE PLAINTIFF IN ERROR IS NOT ENTITLED TO HIS DISCHARGE FROM THE JUDGMENT.

A consideration of the several Bankruptcy Acts and a study of the decisions of the Courts construing the same, convince the mind that neither Congress nor the Courts have ever intended that Acts designed to be beneficent toward the unfortunate and worthy should become instruments of protection to those guilty of the perpetration of "*an atrocious fraud.*"

The Bankruptcy Act of 1867 (U. S. R. S., Sec. 5117), provided:

"No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation, as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved and the dividend thereon shall be payment on account of such debt."

Nearly identical words are used in the Act of 1898 (Sec. 17, Sub. 4):

"Sec. 17. Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The Act of 1898 excepts "(2) judgments in actions for frauds, or obtaining property by false pretenses or false representations, etc."

The Act of February 5, 1903, excepts from provable debts discharged, "(2) * * * *liabilities* for obtaining property by false pretenses, or false representations," etc.

Subdivision 4 remains the same.

The Courts have refused to recognize the restrictive effect of the word "judgments" in the Act of 1898 upon the word "debt" in the Act of 1867. BROWN, J., *In Re* Lewensohn, *supra* (S. D., N. Y.), at page 74, said:

"If a judgment is necessary to prevent the discharge from *barring the debt* a proseccution of the suit to judgment should be allowed; *since the essential nature of the claim, if the charges of false representation are sustained, makes it one which evidently was not designed to be barred.*"

This decision was followed by a case (*In re* Cole, 5 Am. B. R., 780; 106 Fed., 837), decided in March, 1901, by HAZEL, J. (W. D., N. Y.).

Says the learned Court (106 Fed., p. 837):

"It is claimed by the plaintiff in her complaint that the bankrupt has by fraudulent representations defrauded her out of certain real estate in the complaint described to her damage of $8,000. If plaintiff is permitted to proceed and is successful in securing a judgment, it is clear that her judgment would not be dischargeable in bankruptcy under Bankruptcy Act, Sec. 17, Subsection 2. It is strongly urged that the claim as set out in the schedule is provable and is not within the exceptions mentioned in Section 17 and that it may be liquidated

by order of this Court as provided by Section 63b; that this claim or debt is as yet simply a cause of action, if anything, and not having been reduced to judgment could be proved and is dischargeable in bankruptcy. I have examined *In re* Rhutassel (D. C.), 96 Fed., 597, and other authorities cited by counsel, *but I am unable to convince myself that Congress intended that a claim of this nature—one arising from the fraud of the bankrupt—is dischargeable in bankruptcy,* when concededly a judgment for a claim of this character is not released by a discharge. I am disposed to agree with the opinion of Judge BROWN, as expressed *In re* Lewensohn (D. C.), 99 Fed., 73" (quoting opinion as given *ante*).

See also, *In re* Moreau Lieber, 3 Am. B. R., 217; *In re* Thomas, 1 Am. B. R., 515.

In the case at bar, the judgment is both for fraud and for obtaining property by false representations, and the debt upon which the judgment was obtained was created by the fraud of the bankrupt, and therefore it is excepted from the operation of the Bankruptcy Act, by the provisions of both Subdivision 2 and Subdivision 4 of Section 17.

A.—THE JUDGMENT IS EXCEPTED UNDER THE PROVISIONS OF SUBDIVISION 2 OF SECTION 17 EXCEPTING JUDGMENTS IN ACTIONS FOR FRAUDS, OR OBTAINING PROPERTY BY FALSE PRETENSES OR FALSE REPRESENTATIONS.

The idea that the exception of Subdivision 2 relates only to actions for deceit is preposterous because of the very force of the terms employed. Congress was careful to say "actions for frauds" and not "actions of fraud" or "actions in deceit." The meaning of this is simple. "Actions designed to remedy frauds" was what was intended as clearly as that idea can be expressed in ordinary English. To say that the original fraud becomes expurged by the formal judgment behind which no inquiry may be made, is frivolous both as matter of the direct inspection of the Act and also under the adjudications already made.

Says Brandenburg in his work on Bankruptcy (2nd Ed.), at p. 275:

"Judgments in actions for fraud or obtaining property by false pretences or false representations are excepted from the operation of a discharge; and the cause of action does not become merged in a judgment thereon, so as to preclude the plaintiff from showing *that the original debt was created in fraud.*"

In support of the text the author cites

Packer *v.* Whittier, 91 Fed., 511.
In re Pettis, Fed. Cas., No. 11,046.
Warner *v.* Cronkhite, Fed. Cas., No. 17,180.

See also cases cited *ante.*

The result is that in this case the Court should not merely consider the judgment itself, but should examine the entire judgment roll, to find whether the suit was brought to remedy a fraud; and if it should find the existence of such fraud at the root of the cause of action, then under established law, whether the Court should hold Subdivision 4 of Sec. 17 to be applicable, or should decide that the plaintiff, O'Beirne, and the Trust Company must rest their objection upon Subdivision 2 of that section, the motion for a discharge of the judgment in question must be denied.

That the complaint prayed relief, not only (as stated by counsel below) for specific performance, but also for damages in the alternative, does not affect our position. The cause of action for specific performance or damages is based, as was well and repeatedly held by the Court of Appeals *upon the fraudulent representations* of Bullis and Barse. Counsel in the proceedings in New York State seemed to lose sight of the distinction between the basis upon which a suit may be brought and the relief sought. *The Bankruptcy Acts look to the substance of the injury underlying the cause of action and not the particular kind of relief which may be obtained.* Hence all such cases as McDonough *v.* Dillingham, 43 Hun, 493, and Stitt

v. Little, 63 N. Y., 427, have no application here. The latter case holds merely that as a generl rule *proof* (not allegation), which is abundant in this case, as the findings show, that the plaintiff relied upon the representations which were untrue and made with fraudulent intent, is necessary to support the action at law and construes a complaint with respect to technical rules upon which a common law action in deceit may be based.

In the Courts of New York counsel were in total error in their claims in this regard, as is shown, among other authorities, by the case of Frey *v.* Torrey, 70 App. Div., 166, where LAUGHLIN, J., for the First Appellate Division (at p. 171), said:

"The claimant may sue on contract, and if the discharge in bankruptcy be pleaded he may in rebuttal show that the debt was created by fraud *not to change his cause of action from contract to fraud,* BUT TO PREVENT ITS BEING BARRED BY THE DISCHARGE IN BANKRUPTCY (*Argall* v. *Jacobs,* 87 N. Y., 110; *Schroeder* v. *Frey,* 60 Hun, 58; aff'd 131 N. Y., 562; *Stewart* v. *Emerson,* 52 N. H., 301; Brandenburg on Bankruptcy, § 273)."

This suit was in equity as to form, but was brought to remedy a wrong wrought by a fraud, and no other authority is needed, we apprehend, to show that equity has concurrent jurisdiction with law in cases of fraud, than the decisions cited *ante* and the rulings of the Court of Appeals sustaining the jurisdiction herein and awarding damages for the fraud as prayed.

It is, we think, elementary that specific performance may in some cases be an appropriate remedy where the claim rests in fraud as well as where there is no fraud. It is merely the remedy, and is neither the nature of the claim nor the cause of action itself.

Counsel have persisted in the New York Courts in ignoring the allegations of fraud stated in the complaint, as well as the alternative relief prayed, *i. e.*, damages for *fraud,* and attempted to distort the ruling of the New York Courts into a

decision that the action was for *specific performance*, without any basis of actual fraud. The desperate character of this attempt to defeat the ends of justice on the part of Bullis leads us merely to suggest that the Court consider the opinions in the case. We feel well assured that our best argument lies in such an examination.

B. THE DEBT OF THE PLAINTIFF IN ERROR UPON WHICH THE JUDGMENT WAS OBTAINED IS EXCEPTED FROM THE BANKRUPT'S DISCHARGE IN BANKRUPTCY UNDER SUBDIVISION 4 OF SECTION 17, BECAUSE IT WAS "CREATED BY HIS FRAUD."

The words of the statute are:

"Sec. 17. Debts not affected by a discharge. A discharge in bankruptcy shall release a bankrupt from all of his provable debts, except such as * * * (4) were created by his fraud, embezlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity."

The alternatives are clearly expressed between the commas. The *debts* excepted are such as "were created,"

(1) by his (the bankrupt's) fraud;

(2) by his embezzlement;

(3) by his misappropriation;

(4) by his defalcation (*a*) while acting as an officer or (*b*) in any fiduciary capacity.

In construing this subdivision it is noteworthy that a comma occurs between the words "misappropriation" and "or," a phase of punctuation not correctly adopted in case the words "while acting as an officer" were intended to modify any of the substantives preceding the word "defalcation"; which, by the way, is a word aptly, if not exclusively, adapted to official acts, as contra-distinguished from private acts, to which latter class the terms "fraud," "embezzlement" and

"misappropriation" are usually applied. The absence of a comma after "officer" naturally causes the word "defalcation" to be modified also by "in any fiduciary capacity." The Appellate Division did not acquiesce in all the respondent's theory of grammatical construction, but inclined to the view that the words "fraud," "embezzlement," and "misappropriation" were equally with the word "defalcation" modified by the remainder of the clause.

The grammatical construction of this subdivision has come under the notice of the Appellate Division for the First Judicial Department. Said LAUGHLIN, J., for that tribunal, in the case of Frey *v.* Torrey, 70 App. Div., 166 (at 169):

"If the words 'fraud,' 'embezzlement' and 'misappropriation' are all qualified by the clause 'while acting as an officer or in any fiduciary capacity,' it is difficult to see the purpose of the use of the word 'fraud' at all."

It is submitted that this view is correct both as matter of technical construction of words and as consonant with complete justice.

In re Butts, 10 Am. B. R., 16, 120 Fed., 966 (N. D., N. Y.), RAY, J., who was Chairman of the House Committee on Judiciary at the time of the passage of the Act of 1898, says, at pages 19-21 and 969-970:

"In Frey *v.* Torrey, 8 Am. B. R., 196, 70 App. Div., 166, 75 N. Y. Supp., 40, it was held:

'The words 'while acting as an officer or in any fiduciary capacity,' used in Subdivision 4 of Section 17 of the United States Bankruptcy Law, excepting from the operation of the discharge in bankruptcy an indebtedness 'created by his fraud, embezzlement, misappropriation, or defalcation while acting as an officer or in any fiduciary capacity,'' do not qualify the words 'fraud,' 'embezzlement,' and 'misappropriation,' but only the word 'defalcation.'

That Subdivision 4 of Section 17 is open to both constructions is a matter of regret. If this subdivision had been made to read, 'or were created by his fraud, embezzlement, or misappropriation, or were created by his defalcation while acting

as an officer or in any fiduciary capacity,' there would be no question that the words 'while acting as an officer or in any fiduciary capacity' would only qualify or apply to the word 'defalcation.'' Or if the subdivision had been made to read, 'or were created by his fraud, embezzlement, or misappropriation, or were created by his fraud, embezzlement, or misappropriation or defalcation while acting as an officer or in any fiduciary capacity,' there would be no question that debts created by fraud or embezzlement or misappropriation or defalcation would not be affected by a discharge in bankruptcy, irrespective of the existence of the technical trust or fiduciary relation.

The framing of this subdivision was a matter of great difference of opinion, and the words used are the result of an agreement between those who insisted that debts created by fraud, embezzlement and misappropriation, irrespective of the existence of the technical trust relation, should not be affected by the discharge, and those who insisted they should be. It was contended that debts created by fraud, by embezzlement, or by misappropriation should not be affected by the discharge in bankruptcy. Indeed, it is difficult to see why they should be. The existence or non-existence of the technical trust or fiduciary relation would seem to be immaterial so far as the moral turpitude is concerned. Is there any good reason why the executor, trustee of an express trust, or guardian of an infant should be refused a discharge if he embezzles or misappropriates the funds entrusted to him, when the person who does not occupy these technical trust or fiduciary positions may embezzle or misappropriate the funds or property intrusted to him and be discharged from the debt thus created in bankruptcy proceedings? If there is a debt existing for property or money embezzled or misappropriated by a person occupying the technical fiduciary position, there is a 'defalcation,' for the money or property is gone, and has not been made good. 'Defalcation while acting as an officer or in any fiduciary capacity' would seem to imply and include either embezzlement or misappropriation or both. It was supposed that the use of the language employed would forbid the discharge of any person from a debt created by his fraud, or by his embezzlement or misappropriation of funds or property, in whatsoever capacity or relation acting, and also the debts created by the defalcation of an officer or person occupying the technical trust or fiduciary relations known to and recognized by our law. It must be conceded, however, that the word

'defalcation' is broader than 'embezzlement' or 'misappropriation.' Neither class of debts so created should be construed out of the section providing what debts shall not be affected by a discharge."

The Courts have been reluctant to put upon the Acts of Congress a construction which could not have been intended, and which will have the effect of relieving fraudulent debtors from the just consequences of their wrongful deeds. The English Courts have long been outspoken in excluding from the benefit of Bankruptcy Acts those who committed wrong in the manner of creating debts.

3 Term Rep., 539.
Cook's Bankruptcy Law, 223.
Parker *v.* Norton, 6 Term R., 695.
Goodtitle *v.* North, 2 Doug., 583.

Said LAWRENCE, J., in the case of Parker *v.* Norton, 6 Term Rep., at 701:

"The bankrupt laws were intended to protect the bankrupts from all suits on contracts entered into previous to his bankruptcy on his giving up all of his property for the benefit of his creditors; *but it was not the object of those laws to protect the bankrupt from the consequences of gross frauds like the present.*"

Counsel for plaintiff in error in his brief has cited with reliance the case of Burnham *v.* Pidcock, 58 App. Div., 273.

That case passed only on Subdivision 2, of Section 17, of the Act of 1898, and that with respect to *a case where no actual fraud appeared* as the underlying basis of the suit, the cause of action for conversion being inconsistent with such actual fraud and proceeding only on the theory of constructive fraud. *There was a formal waiver of actual fraud, and if any were shown it would be regarded as purely incidental.* We do not contend here that cases of constructive fraud are excepted from the operation of a discharge in bankruptcy; but we do insist that actual fraud is shown in this record, and that actual

fraud was the basis of the cause of action. It has not been waived by any inconsistent form of action and therefore cannot be claimed to be immaterial or incidental. If we are correct in this, the case of Burnham *v.* Pidcock is no authority for the bankrupt's petition here. It is, however, an authority to the effect that the opinion must be received in evidence (see head note) in determining the question of fraud; from which it follows that the form of the complaint is not decisive upon the point.

Emphasis is also placed by counsel on the case of Hargadine-McKittrick D. G. Co. *v.* Hudson, 111 Fed., 361. In that case the action was one of debt on a judgment rendered in a State court in Texas. The defendant pleaded his discharge in bankruptcy granted in a District Court of the United States for the District of Colorado. The suit was brought in the United States Circuit Court in Missouri. The plaintiff contended that the foundation of the judgment sued on was created by the fraud of the defendant and he set forth the facts constituting the fraud. The judgment, however, upon which suit was brought was upon an action upon a promissory note. It did not appear anywhere in the record that there was any fraud in the inception of the action. There was a formal waiver of actual fraud and the suit was brought in the "usual and ordinary form" upon a promissory note. The plain distinction between that case and the case at Bar, is that actual fraud is shown throughout this record and actual fraud is the basis of the action, while in the above mentioned case the *record* nowhere shows that there was fraud in its inception.

The case *In re* Rhutassel, 96 Fed., 597, is likewise not in point for the same reasons. As stated by the Court, Shiras, D. J., and quoted by counsel in his brief, "In other words the judgment rendered, *in connection with the pleadings upon which it is based,* must establish the fact that the claim sued on and mentioned in the judgment, was created through fraud or by false pretenses or by willful and malicious injury to the

property of another * * *" It is also stated by Mr. Justice Shiras (page 599) "That the *judgment* does not show that the debt upon which it is based was created by fraud or by false statements."

In the present action the judgment, and the pleadings upon which it is based do establish the fact that the claim sued on was created through *fraud.*

Other cases cited by counsel will be briefly referred to.

The case of Mo. S. & L. *vs.* Rice, 84 Fed., 131, is not in point, because in that case, as is stated in the opinion quoted by counsel for plaintiff in error, it was not an "action for relief on the ground of fraud."

The present case has, we submit, been conclusively shown to be an action in equity for relief on the ground of fraud.

The question of fraud nowhere enters into the case of Slaughter *vs.* Co. F. & C., 119 Fed., 588. It is merely one of election of remedies between a suit for damages and one for specific performance.

In Bixby *v.* Wood, 24 N. Y., 607, no fraud was shown, and the only point of the decision was whether in an action for the recovery of money paid on fraudulent representations and no fraud is made out, the cause of action is assignable.

In Oatley *v.* Lewine, 47 Barb., 18, it was expressly stated (p. 21) that the action was brought "not upon the ground that the defendant was not the owner or falsely represented himself to be the owner" of certain property in question.

A similar failure to show fraud occurred in Chesterman *v.* Gardiner, 5 Johns. Ch., 27, with the additional circumstance that the plaintiff had waived all his rights.

In Lawrence *v.* Harrington, 122 N. Y., 408, the fraud was clearly held to be constructive only.

In Brown *v.* Roach, 52 Miss., 536, the Court said:

"But when closely analyzed it is not clear to see precisely how the plaintiffs were damnified by the acts complained of."

In Frances *v.* N. Y. &c. R. Co., 17 Abb. N. C., 1, the representations were very doubtful, and, to the mind of the Court, if made at all were not in any sense statements of facts.

Here the representations as to location, title, encumbrance, timber producing qualities, etc., were all statements of existing facts. The land was actually pointed out, although falsely, and the record, particularly the findings, show in great detail the magnitude of the fraud perpetrated. To say that this fraud was not actual fraud, and that Bullis and Barse were morally innocent of the effect of the false representations made by them is so amply refuted by the findings of the Special Term that we submit the question of fact in full confidence. Mr. Justice FOLLETT's characterization of the fraud as "atrocious" hardly applies to constructive fraud, and Mr. Justice BARRETT adopts this characterization as fitting the whole case after Bullis and Barse had testified.

In Sparman *v.* Keim, 83 N. Y., 245, "the representations were *promissory* and matter of opinion." There was nothing therein to deserve the characterization of "AN ATROCIOUS FRAUD" with which the courts have branded the acts of the plaintiff in error.

It is therefore respectfully submitted that the writ of error should be dismissed.

FRANK SULLIVAN SMITH,
Attorney for James R. O'Beirne,
Defendant in error.

The defendant in error, Central Trust Company of New York, submits its case upon the foregoing argument.

ADRIAN H. JOLINE,
Attorney for Deft. in Error,
Central Trust Company of New York.

Supreme Court of the United States.

No. 60.—October Term, 1904.

Spencer S. Bullis, Plaintiff in Error,
vs.
James R. O'Beirne, on behalf of himself and all other bondholders of The Allegheny and Kinzua Railroad Company, and The Central Trust Company of New York.

In error to the Supreme Court of the State of New York.

[December 12, 1904.]

The plaintiff in error, Spencer S. Bullis, having been discharged in bankruptcy on September 19, 1899, which discharge covered provable debts existing on November 14, 1898, made application under the New York Code, section 1268, for the cancellation and discharge of certain judgments rendered against him in the Supreme Court of New York. The defendants in error, judgment creditors of said Bullis, opposed the granting of the order upon the ground that the judgments against Bullis were in an action for fraud, and therefore not discharged under the terms of the bankrupt law. The Supreme Court of New York denied the application. Upon appeal to the Appellate Division, Fourth Department, this judgment was affirmed. (68 App. Div. Rep. 508.) Bullis then appealed to the Court of Appeals of New York, which affirmed the judgment of the court below without opinion. (171 N. Y. 689.)

The facts necessary to be noticed in this case are in substance: James R. O'Beirne, in behalf of himself and other bondholders, filed a complaint, setting forth, among other things that, on September 8, 1899, Bullis and one Barse owned the capital stock of three railroads, two organized under the laws of Pennsylvania and one under the laws of the State of New York, which railroads were constructed for the purpose of reaching timber on large tracts of land. At that time the length of the railroads was about sixteen miles, but an extension of the lines was contemplated so as to cover about thirty miles. Certain agreements are alleged between said Bullis and Barse and a firm of bankers, Newcombe and Company, of New York, by the terms of which Bullis and Barse were to execute a mortgage to the Central Trust Company of New York, to secure $250,000 of first mortgage bonds running thirty years, which mortgage was to cover the railroad properties and 30,000 acres of timber lands in ~~Duquesne~~ McKean County, Pennsylvania. The property was to be under the management of a new corporation, to be organized with a capital stock of $250,000. Various agreements were made as to the organization and management of said corpora-

tion. Another agreement was entered into between the parties, providing for the merger and consolidation of the railroads into a new company with a capital stock of $500,000, and for a mortgage to the Central Trust Company as trustee to secure $500,000 of first mortgage bonds. The railroad lines were to be extended to seventy miles and 16,000 acres of timber lands to be included, making 46,000 acres to be owned by the new company. Three hundred thousand dollars of the bonds were to be put upon the market, to represent forty-six miles of the railroad. Newcombe and Company were to dispose at par of $260,000 of these bonds in accordance with the terms of the agreement. Bullis and Barse were to enter into an agreement for consolidating the said railroads into one system, by agreement with the International Interior Construction and Improvement Company. On September 10, 1899, the Construction Company made a contract with the Allegheny and Kinzua Railroad Company, owned by Bullis and Barse, and one with Bullis and Barse, providing for the construction and consolidation of the railroads and for the distribution of the proceeds of the bonds, a considerable portion of which were to be given to Bullis and Barse.

The complaint specifically charges: That Bullis and Barse falsely and fraudulently pretended and represented to the said firm of I. B. Newcombe & Company that said tract of 30,000 acres to be conveyed was free and clear from all encumbrances; that all of said land was contiguous or adjacent to the line of said railroad as the same was then constructed or surveyed or projected, and the said land was covered by a large quantity of merchantable timber, capable of yielding and producing seventy tons of freight in timber, lumber and bark for each acre of land, for transportation over said railroad. It is further alleged that, in fulfillment of said agreements, the defendant railroad corporation, on the first day of February, 1890, executed its first mortgage deed of trust to said trust company, conveying to it said railroad properties and franchises, and providing for an issue of bonds limited to $500,000, to be secured by said properties and the 46,000 acres of timber to be conveyed by said Bullis and Barse to said trustee. That the defendants Bullis and Barse caused the said Bullis and Sarah E., his wife, to join with said railroad company in said mortgage, and that by said mortgage they assumed to convey to said trustee land contiguous to the line of said railroad and free from encumbrances, and covered by a quantity of merchantable timber, aggregating 30,954.10 acres, and which by the terms of said agreements was to be a condition precedent to the issue of $300,000 of said bonds to be used in building and completion of said forty-six miles of said railroad; that in reliance upon the conveyance of said lands bonds to the amount of $300,000 were issued and were sold by Newcombe & Company, ten of which were purchased by the plaintiff in the action; that all the proceeds of the said bonds have been used in the construction of said lines and in the pay-

ment of prior liens upon the property and the constituent lines, and that the defendant railroad company, which is the consolidated company, is wholly without funds, and that the extension thereof is essential to enable it to obtain money to meet its liabilities; that said Bullis and Barse refused to convey to said trustees the remaining 16,000 acres of such land and to provide for the building of the balance of said railroad, whereby the construction company is unable to proceed with its work of completing the same.

The complaint further alleges that said 30,954.10 acres of land, conveyed by Bullis and his wife, were not free from encumbrances; that the same at the time were subject to prior liens aggregating $159,000, besides interest; that $144,776.07 of said indebtedness still remain unsatisfied; that said land was not covered with merchantable timber, but was waste land, from which the salable timber had been removed, and that a large portion of said land was not adjacent to the line of said railroad and the timber thereon not accessible to be transported thereon; that a large portion of the land so assumed to be conveyed was not owned by either of the said defendants, and was not conveyed at all by said deed. All of which facts the said Bullis and Barse well knew at the time they made said pretended conveyance, and said conveyance is in reality false and fraudulent; that by reason of the fraud and failure of said Bullis and Barse to convey said land free of liens a great fraud has been committed by them which will cause irreparable injury to the bondholders, including the plaintiff, unless the performance of the said agreements and the conveyance of 30,000 acres of unencumbered timber land to said trustee are specifically decreed.

The prayer of the complaint is—

"Wherefore, plaintiff demands judgment that immediate specific performance by the said defendants Bullis and Barse and said defendant railroad company of their said agreements to convey unto the trustee of said defendant railroad company's mortgage, and place under the lien of said instrument 30,000 acres of timber land contiguous or tributary to the line of railroad of said railroad company, as in said agreements stated, free of all encumbrance of whatsoever nature prior to the said mortgage above mentioned; or that said defendants pay to said trustee, for the security of said bondholders, such a sum of money as the court shall ascertain to be equivalent to the value of said lands and real estate, conveyed as aforesaid, which are not in conformity with the terms of said several agreements, and said bonds, and the mortgage or deed of trust securing the same; and in addition thereto 16,000 acres of like timber land, in all respects similarly situated, and free from encumbrance, as security to authorize the issue of $200,000 of bonds in said agreements specified, and set apart for the construction of the twenty-four miles of railroad of said company additional to the forty-six miles above mentioned."

And for injunction and general relief.

The case was tried at special term of the New York Supreme Court. That court dismissed the complaint, holding that as Bullis and Barse did not own the lands, specific performance could not be decreed and the case could not be held for the assessment of damages. This judgment was reversed by the general term. (80 Hun, 570.) Upon appeal taken by the Allegheny and Kinzua Railroad Company, one of the defendants, this judgment in general term was affirmed by the Court of Appeals of New York. (151 N. Y. 372.) Bullis and Barse, after the reversal at general term, went to trial at special term, and upon the allegations of fraud, findings were made, among others: That Bullis and Barse pretended and represented to the said firm of Newcombe & Company that the 30,000 acres of land were timbered, free and clear of all encumbrances, and contiguous and adjacent to the line of the defendant railroad company, as the same was then constructed and projected, and that said land was covered by a large quantity of merchantable timber, which would actually provide said railroad company with at least seventy tons to the acre, for conveyance over said railroad at rates from twenty-five to fifty cents per ton, in addition to the percentage accruing to said defendant railroad company from divisions of other lines. That said agreements were entered into at the request of Bullis and Barse; that engineers were sent from New York to inspect the timber on the land to be conveyed; they were escorted through certain timber lands by said Bullis, and these lands were heavily timbered, and said Bullis stated that said lands were to be placed under the mortgage to the trustee, and a report in accordance with this statement was made by the engineers, and upon this report said Newcombe & Company embarked in the enterprise and entered into said scheme of consolidation and extension. That the lands so defined and pointed out were worth from eighteen to twenty dollars an acre. That Bullis and Barse had stated to Newcombe & Company that the mortgage was to be a first lien, the lands to be well timbered, and contiguous and tributary to said line of railroad; that said trust mortgage was approved and accepted in the belief that said representations were true in fact, and that Bullis and Barse were in good faith performing their said covenants.

The court further found that the plaintiff was, in fact, deceived by said statements and representations; that said statements and representations were false; that said agreement was, in fact, fraudulently made with respect to the lands agreed to be conveyed by Bullis and Barse; that a great part of the lands included in the deed was not the property of Bullis, and the value of that owned by him and not timbered was $13,350, while that apparently covered by the deed, but not owned by him, was worth $175,502.77, and a considerable part of that included in the conveyance was encumbered; that the statements of Bullis and Barse with

respect to said timber lands were false and fraudulent and made with intent to deceive.

As a conclusion of law, the court decided that it had jurisdiction to proceed in the cause by reason of the fraud practiced by the defendants Bullis and Barse in the premises and because of the fact that the plaintiff had been deceived by the fraudulent statements and misrepresentations of the defendants. This decision was affirmed. (*O'Beirne* v. *Bullis*, 2 App. Div. 545.) Upon appeal to the Court of Appeals of New York this judgment was affirmed. (158 N. Y. 466.)

It appearing that Bullis and Barse were unable to specifically perform the original agreement, but that they were liable for false representations, judgment was rendered against them in favor of the Central Trust Company, representing the bondholders, in the sum of $341,745.65, and for the plaintiff in the sum of $3,586.40.

Mr. Justice DAY delivered the opinion of the Court.

This action involves the construction of section 17 of the bankrupt act of 1898, (30 Stat. 550,) as it stood prior to the amendment of February 5, 1903. So far as it pertains to this case, this section is as follows:

"A discharge in bankruptcy shall release the bankrupt from all of his provable debts except such as . . . (2) are judgments in actions for frauds, or obtaining property by false pretenses or false representations, or for willful and malicious injuries to the property or person of another, . . . (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in a fiduciary capacity."

In *Crawford* v. *Burke*, decided at this term, *ante*, , this court held that subdivision 4 of this act was limited to frauds, embezzlements, misappropriations or defalcations while acting in an official character, or in a fiduciary capacity, and did not apply to other debts or obligations fraudulently created. The question therefore presented in this case is, was the judgment against Bullis and Barse as finally reached in the New York courts one in "an action for fraud" within the meaning of the act?

It is distinctly charged in the complaint and found in the judgment that the agreement was fraudulently made; that Bullis and Barse falsely and fraudulently pretended that the large tract of timber land which they were to put under the mortgage for the security of the bondholders was free from all encumbrances; that it was near the line of the projected railroads and covered by a large quantity of merchantable timber, when, in fact, as Bullis and Barse well knew, the 30,000 acres of timber land actually mortgaged was not free from encumbrances but was subject to $159,000 and interest of prior encumbrances, and that it was waste land from which the timber had been removed; that the lands were not adjacent to the lines of

the railroads; that the timber was not accessible, and that a large portion of the land to be conveyed was not owned by either of the defendants; that all of these facts were well known to Bullis and Barse when they made the false and fraudulent representations aforesaid, and were relied upon to the prejudice of the bondholders. The New York courts found that the agents of the New York brokers attempting to negotiate the bonds, when they went to see the lands, were shown those not included in the mortgage, and which were falsely and fraudulently pointed out as being the intended lands. Under these allegations and proofs the New York courts have seen fit to render a money judgment, not for specific performance as upon contract, but for the frauds charged against the defendants.

As was said of the action and the relief granted, in the opinion of the appellate division (68 Ap. Div. 508, affirmed in 171 N. Y. 689): "The action for specific performance in the strictest sense thereof was founded upon the actual positive fraud of the defendants Bullis and Barse. They had in fact, in pretended compliance with their agreement, conveyed to the designated trustee 30,000 acres of land. The plaintiff alleged that the defendants fraudulently included in this conveyance lands not owned by the grantors, and the bulk of the tract was not timber land, was encumbered and was not adjacent to the railroad lines described. . . . The gist, the intrinsic ingredient of the action, was consequently the fraudulent scheme, the false representations, of these defendants."

Considerable argument was made by the learned counsel for the plaintiff in error as to the essential allegations of a pleading where relief for fraud is sought. It is said that there is no averment in the complaint in this case of knowledge or intent to deceive upon the part of the plaintiff in error, but it is averred that the representations were falsely and fraudulently made with the intent to further the pecuniary interest of the plaintiff in error, and were known to be false when made. Such allegations have frequently been held the equivalent of averments of specific intent. Indeed it is difficult to perceive how a statement falsely and fraudulently made can be otherwise than intended to deceive. A statement fraudulently made with knowledge of its falsity must necessarily be intended to deceive. (*Bank of Montreal* v. *Thayer*, 7 Fed. Rep. 625, and cases cited in the opinion.) It is argued that Bullis, one of the defendants, regarding the case as one for fraud, demanded a jury trial, which was denied him, and that this shows the character of the case. But, as appears in the opinion of the New York Court of Appeals, (158 N. Y. 466–468,) when the demand for a jury trial was made the defendants had not set up their inability to perform the contract, but had taken issue upon the allegations of fraud and misrepresentation. In this attitude of the case it was held that a jury trial was properly denied.

But it is unnecessary to further consider questions of practice peculiar to the jurisdiction where the judgment was rendered. Whether the complaint sufficiently charged fraud to warrant the judgment given is not a Federal question. (*Forsyth* v. *Vehmeyer*, 177 U. S. 177, 180.) The question for this court is whether the judgment rendered by the New York court is in an action for fraud. If so, it is excepted from the effect of a discharge in bankruptcy.

We think an inspection of the record as well as the interpretation put upon the pleadings and judgment by the courts of New York in the various trials and proceedings had, show that the relief was granted upon the ground of fraud. When the case was first before the New York Court of Appeals, Judge Gray, delivering the opinion of that court, said:

"The theory of the complaint and the tendency of the proof upon the trial were that a fraudulent scheme was devised by Bullis and Barse, having for its object the consolidation of certain railroad properties, owned and controlled by them, and the issuance of a large number of bonds by the consolidated company, which should be placed with the public at par through the cooperation of Newcombe & Company, whose assistance to the scheme, in the negotiation of the bonds, should be gained by representations and agreements of such a nature, as to the timber tracts to be furnished as additional security under the mortgage that the bonds would appear to be attractive and salable securities. We are not called upon, at the present time, to pass upon the liability of Bullis and Barse for the parts they have played in the development and consummation of this scheme, inasmuch as they have gone back to a new trial; but on the face of this record that the evidence amply warranted the findings by the trial court is not to be denied, and it would have justified the granting of relief to this plaintiff had the case been in a shape to make that possible." (151 N. Y. 372–84.)

When the case was sent back for trial, after it had been held that it might be retained for the assessment of damages, in its conclusions of law the Supreme Court at special term decided that it "had jurisdiction to proceed in the cause by reason of the fraud practiced by the defendants Bullis and Barse in the premises." This manner of exercising jurisdiction by the lower court was expressly affirmed by the Supreme Court at general term, (2 App. Div. 545,) and finally by the Court of Appeals of New York, (158 N. Y. 466.) In the latter case the court said:

"The theory upon which the decision proceeded was that they [Bullis and Barse] devised a fraudulent scheme for the consolidation of certain railroads owned and controlled by them, issued bonds upon false representations as to the timber lands to be furnished as added security under the mortgage to make the bonds secure and salable; that upon those facts the court would have been justified in granting relief to the plaintiff against them, and that the corporation, having been the instrumentality employed by them, was also liable. Thus it was that the liability of the appellants was involved in the decision. We adhere to the principle of our decision upon that appeal."

It is thus apparent that the courts of New York, in conformity to their own practice, have rendered a judgment against Bullis and Barse by reason of the fraudulent scheme found, and because of the fraudulent representations made to and relied upon by the parties to whom the relief was granted. The Federal question is, is such a judgment entitled to be discharged in bankruptcy? Under the bankrupt law of 1867 it was provided: "No debt created by the fraud or embezzlement of the bankrupt, or by his defalcation as a public officer, or while acting in any fiduciary character, shall be discharged by proceedings in bankruptcy; but the debt may be proved, and the dividend thereon shall be a payment on account of such debt." (Rev. Stat. 5117.)

In the law of 1898, for reasons which have been the subject of much diversity of view in the courts, but which were sufficient in the judgment of Congress in passing the act to necessitate a change, it is provided, instead of exempting debts created by fraud from the operation of the discharge, that only judgments in actions for fraud shall be ~~discharged~~. Under this act, (as it was before the passage of the act of February 5, 1903,) claims grounded in fraud will not be ~~discharged~~ unless reduced to judgment, but the essential character of the fraud which is here meant has not been changed. By the decisions of this court, which are collected in the opinion delivered in *Forsythe* v. *Vehmeyer, supra*, it was held, reviewing the former cases in this court, that, under the act of 1867, the fraud referred to meant positive fraud, or fraud in fact involving moral turpitude or intentional wrong, and not implied fraud, which may exist without an imputation of bad faith. "Such a construction of the statute," it was said in *Neal* v. *Clark*, (95 U. S. 704, 709,) "is consonant with equity, and consistent with the object and intention of Congress in enacting the general law by which the honest citizen may be relieved from the burden of hopeless insolvency. A different construction would be inconsistent with the liberal spirit which pervades the entire bankrupt system." This language, we think, equally applies to the present case. The difference is that under the act of 1898 claims for fraud prosecuted to judgment will not be ~~discharged~~. The reason for this change, as suggested by Mr. Justice Brown, in delivering the opinion in *Crawford* v. *Burke*, may be that Congress did not intend to offer any inducement to change unliquidated claims into actions for fraud, and therefore limited the exception from the operation of the discharge to such cases only as had been litigated and reduced to actual judgment. When such is the case we think a correct interpretation of the law does not require a close examination into the form of the action to determine whether technically it is one *ex delicto* or otherwise, but the real question is, was the relief granted in the judgment, based upon actual as distinguished from constructive fraud of the bankrupt. If the judgment is thus founded, whatever the

form of the action, it is the intent and purpose of the law that the bankrupt shall not be discharged from it, but shall still rest under its obligation, so far as the bankrupt law is concerned.

As thus interpreted, we think there can be no question that the judgment rendered in this case was based upon the fraud of Bullis and Barse. The facts charged and found showed false and fraudulent representations as to the character of the property which was to be the security of those who should purchase the bonds and resulted in depriving them wrongfully of valuable rights. These findings were held sufficient in the State tribunals to warrant relief on the ground of fraud, and the judgment in this case is, in our opinion, in an action for fraud within the meaning of the bankrupt law.

The judgment of the Supreme Court of New York is, therefore,

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

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